PETITION FOR CERTIORARI FILED JULY 9, 1921.

CERTIORARI AND RETURN FILED NOVEMBER 5, 1921.

(28,360)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 405.

AMERICAN MILLS COMPANY, PETITIONER,

vs.

AMERICAN SURETY COMPANY OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 *Complaint.*

Supreme Court of the State of New York.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff,

against

AMERICAN MILLS COMPANY, Defendant.

Trial to be Had in New York County.

Plaintiff complaining of defendant, alleges:

First. That at all times hereinafter mentioned plaintiff was and still is a domestic corporation.

Second. That at all times hereinafter mentioned plaintiff was and still is duly licensed to transact business as a corporate surety within all the States of the United States, maintaining offices for the regluar transaction of business in Chicago, Illinois, and in all other
2 States of the United States, with a representative in each State upon whom, process in legal proceedings against the plaintiff may be lawfully served.

Third. That at all times hereinafter mentioned defendant was a foreign corporation organized under the laws of the State of Georgia, having its principal place of business at Atlanta, Georgia, and having an office for the regular transaction of business, in charge of a vice-president of defendant, in the County, City and State of New York.

Fourth. That at the times hereinafter mentioned the Hartenfeld Bag Company was a foreign corporation organized under the laws of the State of Illinois, and having its principal place of business at Chicago, Illinois.

Fifth. That at the times hereinafter mentioned defendant was engaged in business at Atlanta, Georgia, and elsewhere as a jobber and dealer, on commission, in burlap, bags, twines and other merchandise.

Sixth. That at the times hereinafter mentioned and down to December 12th, 1918, the Hartenfeld Bag Company was a dealer in bags and burlap.

Seventh. Upon information and belief, that for some time prior to September 27th, 1918, the Hartenfeld Bag Company had been selling to defendant, and defendant had been purchasing
3 from the Hartenfeld Bag Company, second-hand bags and burlap.

Eighth. Upon information and belief, as a result of previous transactions between them, defendant claimed on or about Septem-

ber 27th, 1918, that the Hartenfeld Bag Company, was indebted to defendant in $11,862.20 or thereabouts.

Ninth. Upon information and belief, that prior to September 27th, 1918, defendant did not have any security from the Hartenfeld Bag Company for the payment of such then existing indebtedness.

Tenth. Upon information and belief, that about August 29th, 1918, defendant ordered of said Hartenfeld Bag Company certain merchandise at an agreed price of $9,225.00 to be shipped to defendant, and for which defendant agreed to pay $9,225.00 ninety days thereafter; and the Hartenfeld Bag Company thereupon shipped to defendant at Atlanta a carload of merchandise which the Hartenfeld Bag Company claimed constituted a delivery in accordance with the terms of such contract of sale.

Eleventh. That thereafter such merchandise so shipped by the Hartenfeld Bag Company under such sale of August 29th, 1918, was received by defendant at Atlanta, Georgia.

4 Twelfth. Upon information and belief that thereupon and on or about the 29th day of August, 1918, the Hartenfeld Bag Company by E. J. Hartenfeld, by an instrument in writing, duly sold and assigned said account for merchandise purchased by the defendant on August 29th, 1918, to the Commercial Credit Company doing business at Baltimore, Maryland, and certified that the defendant was then indebted to said Hartenfeld Bag Company in the sum of $9,225.00 for goods sold, shipped and delivered.

Thirteenth. Upon information and belief that such assignment was on August 31st, 1918, accepted by such Commercial Credit Company.

Fourteenth. Upon information and belief that thereafter and on or about September 14th, 1918, defendant, at the special instance and request of the said Hartenfeld Bag Company, executed and delivered to the Hartenfield Bag Company its two (2) negotiable promissory notes to the order of the Hartenfeld Bag Company, one due December 18th, 1918, for $4,650, and the other due January 5th, 1919, for $4,485.08, being the amount of said bill of August 29th, 1918, of $9,225.00 less $89.92 interest.

Fifteenth. Upon information and belief that thereafter and on or about September 17th, 1918, the Hartenfeld Bag Company procured the discount of said notes so executed by defendant for $4,650 and $4,485.08 by Foreman Brothers Banking Company at
5 Chicago, Illinois; that said Foreman Brothers Banking Company discounted said notes for value and without knowledge or notice that the said Hartenfeld Bag Company had, prior to the execution and delivery of such notes, sold and assigned said account to the Commercial Credit Company.

Sixteenth. Upon information and belief that thereafter and on September 23rd, 1918, the Commercial Credit Company sent a notice in writing to the defendant at Atlanta, Georgia, which notice was

received by defendant on or prior to September 26th, 1918; that in such notice the Commercial Credit Company informed defendant that it had purchased for value said account due from defendant to Hartenfeld Bag Company of $9,225.00 for merchandise purchased by defendant on or about August 29th, 1918; and the said Commercial Credit Company delivered at the same time to defendant a copy of the assignment of said account dated August 29th, 1918, and executed on behalf of the said Hartenfeld Bag Company by E. J. Hartenfeld; and requested the defendant to pay the amount thereof when due to said Commercial Credit Company.

Seventeenth. Upon information and belief that thereupon and after the receipt by defendant of said notice from said Commercial Credit Company that it had purchased said account, the officers of defendant became apprehensive of the insolvency of said
6 Hartenfeld Bag Company, and before replying to said notice, and on or about September 26th, 1918, the president and general manager of defendant went to Chicago to investigate the condition of the Hartenfeld Bag Company and to secure a settlement of the account which defendant claimed against said Hartenfeld Bag Company.

Eighteenth. Upon information and belief, that the Hartenfeld Bag Company on September 27th, 1918, was unable to pay the indebtedness claimed by defendant to be due to it, or to re-pay the Commercial Credit Company the amount for which it had purchased said apparent account of $9,225.00 against defendant; and said Hartenfeld Bag Company was also unable to pay or discharge or secure the return of the said notes for $4,650.00 and $4,485.08 which the defendant had given said Hartenfeld Bag Company in payment for such merchandise and which had been discounted by Foreman Brothers Banking Company; and said Hartenfeld Bag Company was unable to furnish defendant with any property to be held by defendant as collateral security for the payment of the debt claimed by defendant to be due; and that the president of said Hartenfeld Bag Company so informed the president and general manager of defendant.

Nineteenth. That thereupon and on or about September
7 27th, 1918, it was agreed between defendant and the Hartenfeld Bag Company, that defendant should not attempt to deny or repudiate any liability upon its said notes dated September 14th, 1918, for $4,650.00 and $4,485.08, which were then in the possession of Foreman Brothers Banking Company as an innocent purchaser for value, and should not attempt to deny or repudiate the indebtedness of $9,225.00 so assigned by the Hartenfeld Bag Company to the Commercial Credit Company, but on the contrary that defendant should pay to the Commercial Credit Company when due such sum of $9,225.00, despite the fact that defendant had given notes in payment of the same debt which were held by an innocent purchaser for value, before defendant learned or was informed that said account had been assigned to the Commercial Credit Company;

and defendant agreed to accept in payment, and the Hartenfeld Bag Company agreed to pay defendant, for both the prior indebtedness of $11,862.20 claimed by defendant to be due from the Hartenfeld Bag Company and the additional sum of $9,225.00 assumed and to be paid to the Commercial Credit Company and amounting in all to $21,087.20, merchandise to be delivered to defendant's order by said Hartenfeld Bag Company, at prices agreed upon, within seventy-five days thereafter, provided said Hartenfeld Bag Company would secure a bond from plaintiff company guaranteeing the performance by said Hartenfeld Bag Company of said agreement.

8 Twentieth. That defendant and said Hartenfeld Bag Company realized, or were informed by counsel for defendant, that it would be extremely difficult, if not impossible, if plaintiff were informed of the facts and the real agreement between the parties, as set forth in this complaint and particularly in paragraph Nineteenth thereof, to procure from plaintiff such bond securing the delivery by said Hartenfeld Bag Company of said merchandise within seventy-five days in payment of said alleged indebtedness past due and assumed and amounting to $21,087.20; that thereupon, with intent to conceal from plaintiff that the real agreement between the parties was in substance that the Hartenfeld Bag Company should deliver and defendant should accept merchandise in payment of the alleged indebtedness due from the Hartenfeld Bag Company to defendant and to be assumed by defendant and paid to the Commercial Credit Company, providing the Hartenfeld Bag Company would secure such bond guaranteeing the delivery of such merchandise within seventy-five days thereafter, and on or about September 27th, 1918, defendant and said Hartenfeld Bag Company, or either of them, prepared or caused to be prepared a draft of a contract whereby the defendant apparently agreed to purchase and the Hartenfeld Bag Company agreed to sell merchandise as follows:

9 "25,000 Strictly No. 1 Inside Coffee Bags @ 30c. each.
50,000 Strictly No. 1 Gold Medal Bags @ 16c. each.
30,000 lbs. guaranteed strictly No. 1 sewed burlap 40 inch, 8 ounce @ 22c. lb. F. O. B. Chicago.
Total amount of this contract is twenty-two thousand and one hundred dollars ($22,100.00), paid to Hartenfeld Bag Company upon the execution of this agreement, the receipt whereof is hereby acknowledged."

That such draft further provided that the Hartenfeld Bag Company should deliver such merchandise within seventy-five days thereafter and should furnish to defendant a surety bond executed by an approved company of such standing as to be acceptable to defendant in the sum of $22,000.00 guaranteeing the faithful performance by the Hartenfeld Bag Company of the conditions of such apparent contract by the Hartenfeld Bag Company to be performed.

Twenty-first. That thereupon and on September 27th, 1918, the said Hartenfeld Bag Company, in the presence of the president and

general manager of defendant, at Chicago, delivered such draft or a copy thereof to plaintiff and made application to plaintiff for the execution and delivery by plaintiff as surety of a bond guaranteeing to defendant the performance by the Hartenfeld Bag Com-
10 pany of the pretended contract set forth in paragraph Twentieth of this complaint.

Twenty-second. That thereafter and prior to plaintiff's acting upon such application for a bond guaranteeing the performance of such pretended contract, defendant and the Hartenfeld Bag Company re-drafted, amended and executed such pretended contract in words and figures as follows:

Hartenfeld Bag Co., Inc.

Telephone, Haymarket 6543.

Hartenfeld Bag Company, 312-316 North Carpenter St.

Bags and Burlaps.

Chicago.

Member Chicago Association of Commerce.

Contract Entered Into — and Between American Mills Company Corporation, Atlanta, Ga., Party of the First Part, and the Hartenfeld Bag Company Corporation, Chicago, Ill., Party of the Second Part.

American Mills Company agrees to purchase and the Hartenfeld Bag Company agree to sell the following bags at specified
11 prices, subject to specified conditions as therein contained.

25,000 strictly No. 1 Inside Coffee bags @ 30c. each.
50,000 strictly No. 1 Gold Medal bags @ 16c. each.
30,000 lbs. guaranteed strictly No. 1 sewed burlap 40 inch., 8 ounce @ 22c. lb. F. O. B. Chicago.

Total amount of this contract is twenty-two thousand one hundred dollars ($22,100.00), paid to Hartenfeld Bag Company upon the execution of this agreement, the receipt whereof is hereby acknowledged.

In the event that said Hartenfeld Bag Company shall not make delivery of the said (merchandise) bags on or before seventy-five days after the date hereof, then said Hartenfeld Bag Company shall retain of said twenty-two thousand one hundred dollars ($22,100.00) only so much thereof as will pay at the contract rate for such bags as has been delivered and accepted by American Mills Company, and said Hartenfeld Bag Company shall at the expiration of seventy-five days immediately return to American Mills Company the difference between said twenty-two thousand one hundred dollars ($22,100.00) and the price of the bags delivered.

The Hartenfeld Bag Company further agrees to furnish to
12 the American Mills Company a Surety Bond properly executed by an approved company of such standing as will be acceptable to American Mills Company, which bond is to serve as a guaranty of the faithful performance of the terms of this contract by the Hartenfeld Bag Company. This bond is to be in the penal sum of $22,000.00.

(Signature) AMERICAN MILLS CO.
A. MAY, *Pres.*

(Signature) HARTENFELD BAG CO.
E. J. HARTENFELD, *Pres.*

September 27th, 1918.

Twenty-third. That on or about September 28th, 1918, the said Hartenfeld Bag Company delivered a copy of said contract as thus redrafted, amended and executed and made application to plaintiff, at Chicago, for the execution and delivery by plaintiff as surety of a bond guaranteeing to defendant the performance by the Hartenfeld Bag Company of such pretended contract set forth in paragraph Twenty-second of this complaint, in place of a bond guaranteeing the pretended contract set forth in paragraph Twentieth of this complaint, and for a consideration or premium of $221.00 to be paid plaintiff by said Hartenfeld Bag Company.

Twenty-fourth. That the statements and representations contained in the pretended contracts set forth in paragraphs Twentieth
13 and Twenty-second of this complaint,—that the said merchandise therein described had been purchased for $22,100.00 which had been paid to the Hartenfeld Bag Company upon the execution of said alleged agreement, and whereby the Hartenfeld Bag Company acknowledged the receipt of such sum and that the transaction was a purchase by defendant for cash, were false and were known to be false by defendant and the Hartenfeld Bag Company at the time said alleged contract was prepared and signed and were inserted therein with the intention and purpose of deceiving plaintiff into the belief that said merchandise had been purchased by defendant for $22,100.00, which had been paid by defendant to the Hartenfeld Bag Company upon the execution of said alleged agreement, and that the transaction was a purchase by defendant for cash, and that defendant had paid the Hartenfeld Bag Company the amount therein specified, to-wit: $22,100.00, upon the execution of such agreement; whereas in fact it was the intention of the parties that nothing should be paid by defendant to the Hartenfeld Bag Company and that the Hartenfeld Bag Company should deliver the merchandise therein set forth in payment of the prior indebtedness, as claimed by defendant, and the assumption and payment by defendant to the Commercial Credit Company of such $9,225.00, and that the pretended contract set forth in paragraph Twenty-second of this complaint, as secured by a bond of plaintiff, should pay and discharge the indebtedness of the Hartenfeld Bag Company to defendant in full.

14 Twenty-fifth. That defendant and the said Hartenfeld Bag Company did not, nor did anyone, disclose to plaintiff that the Hartenfeld Bag Company was unable to pay or furnish security to defendant or said Commercial Credit Company; or that defendant claimed that the Hartenfeld Bag Company owed defendant $11,862.20; or that the Hartenfeld Bag Company had sold and assigned an account of $9,225.00 against defendant to the Commercial Credit Company and thereafter received notes of defendant in payment thereof and negotiated the same to an innocent purchaser for value; and defendant and the Hartenfeld Bag Company did not disclose to plaintiff that the written contracts submitted to plaintiff as the basis of the requested bond were mere shams and intended to conceal the real agreement between the parties; or that the real agreement between the parties was that the defendant would take its pay for the alleged antecedent debt and the amount assumed and to be paid by defendant to the Commercial Credit Company in merchandise, provided the Hartenfeld Bag Company could procure a bond from plaintiff that the Hartenfeld Bag Company would perform such contract, or that it was intended by defendant and the Hartenfeld Bag Company that the execution of said pretended contract as set forth in paragraph Twenty-second of this complaint, as secured by a bond of plaintiff, and without the payment to the Hartenfeld Bag Company of the pretended consideration re-
15 cited therein, should pay and discharge the indebtedness, claimed and to be assumed, of the Hartenfeld Bag Company to defendant in full.

Twenty-sixth. That on the contrary, defendant and said Hartenfeld Bag Company, with intent to deceive plaintiff and secure a bond from plaintiff guaranteeing the performance of such pretended contract set forth in paragraph Twenty-second of the complaint, concealed from plaintiff that the real agreement was that defendant should take merchandise in payment of said alleged antecedent debt and said debt assumed and to be paid by defendant to said Commercial Credit Company, and amounting in all to $21,087.20, and that said pretended contracts, as set forth in paragraphs Twentieth and Twenty-second and as presented to plaintiff as the basis of its bond, were mere shams and intended to deceive plaintiff, and falsely and fraudulently represented to plaintiff that the paper writing set forth in paragraph Twenty-second of this complaint was the true and real contract between the parties and that the recitals therein contained are true and that defendant had on the execution of such pretended contract actually paid to the Hartenfeld Bag Company $22,100.00.

Twenty-seventh. That plaintiff was entirely ignorant that the said Hartenfeld Bag Company was largely indebted to defendant and was unable to pay defendant or furnish security to defendant; that it had received notes from defendant in payment of said
16 sale of August 29th, 1918, and also sold the same account to the Commercial Credit Company, or that the Hartenfeld Bag Company was unable to either pay defendant or satisfy the

Commercial Credit Company, or that the real agreement was that defendant should receive merchandise from the Hartenfeld Bag Company in payment of the alleged antecedent indebtedness and the debt assumed and to be paid by defendant to the Commercial Credit Company, provided the Hartenfeld Bag Company could secure a bond from plaintiff guaranteeing the performance by the Hartenfeld Bag Company of such contract, or that the pretended written contract dated September 27th, 1918, and set forth in paragraph Twenty-second of this complaint, was a mere sham and was intended to conceal the real contract between the parties and deceive plaintiff into executing such bond, or that the sum of $22,100.00, as recited in said pretended contract, had not been paid to the Hartenfeld Bag Company upon the execution of such pretended contract and was never intended to be paid, or that said pretended contract of September 27th, 1918, as set forth in paragraph Twenty-second of this complaint, as secured by plaintiff's bond, and without the payment of the consideration as therein recited, was intended by said Hartenfeld Bag Company and by defendant to constitute a payment in full by said Hartenfeld Bag Company to defendant of the debt claimed and to be assumed and paid by defendant.

17 Twenty-eighth. That the representation that the writing set forth in paragraph Twenty-second of this complaint was the real agreement between the parties thereto, and that the sum of $22,100.00, or any part thereof, had been paid by defendant to the Hartenfeld Bag Company upon the execution of such alleged contract, was false and was known by defendant and the Hartenfeld Bag Company to be false at the time such pretended contract was submitted to plaintiff and plaintiff was asked to execute the bond required thereunder; and such representations were made by defendant and acquiesced in by defendant with the intent that plaintiff might be deceived thereby and might execute such bond.

Twenty-ninth. That plaintiff, in ignorance of the real conditions existing between the parties and of the real contract between them, as set forth in this complaint, which had been concealed by defendant and the Hartenfeld Bag Company with the intent to deceive plaintiff, and relying upon the representation that the pretended written contract of September 27th, 1918, set forth the real agreement between the parties and that the facts therein recited were true and that defendant had upon the execution of such contract actually paid the said Hartenfeld Bag Company the sum of $22,100.00 as therein recited, and believing the same to be true, executed and delivered, on Septembr 28th, 1918, a written bond or undertaking in words and figures as follows; to-wit:

18 *Standard Form of Contract Bond.*

American Surety Company of New York.

Capital, $5,000,000.

Company's Office Building, 100 Broadway, New York.

Know all men by these presents, that we, Hartenfeld Bag Company of Chicago, Illinois (hereinafter called the Principal), as principal, and the American Surety Company of New York (hereinafter called the Surety), as surety, are held and firmly bound unto American Mills Company of Atlanta, Georgia (hereinafter called the Obligee), in the sum of Twenty-two Thousand ($22,000.00) Dollars ($—), for the payment whereof said Principal and Surety bind themselves firmly by these presents.

Whereas, the Principal has entered into a written contract dated September 27th, 1918, with the Obligee, for furnishing 75,000 bags (Coffee & Gold Medal) and 30,000 lbs. guaranteed sewed burlap a copy of which is hereto annexed:

Now, therefore, the condition of this obligation is such, that if the Principal shall indemnify the Obligee against any loss or damage directly arising by reason of the failure of the principal to faithfully perform said contract, then this obligation shall be
19 void; otherwise to remain in full force and effect.

Provided, however, and upon the express conditions, the performance of each of which shall be a condition precedent to any right to recover hereon:

First. That in the event of any default on the part of the Principal, a written statement of the particular facts showing such default and the date thereof shall be delivered to the Surety, by registered mail, at its office in the City of Chicago, Illinois promptly and in any event within ten (10) days after the Obligee or his representative, or the Architect, if any, shall learn of such default; that the Surety shall have the right within thirty (30) days after the receipt of such statement to proceed, or procure others to proceed, with the performance of such contract; shall also be subrogated to all of the rights of the principal and any and all moneys or property that may at the time of such default be due, or that thereafter may become due to the principal under said contract, shall be credited upon any claim which the Obligee may then or thereafter have against the Surety, and the surplus, if any, applied as the Surety may direct.

20 Second. That no claim, suit or action by reason of any default shall be brought against the Principal or Surety after the 24th day of December, 1918 nor shall recovery be had for damages accruing after that date; that service of writ or process commencing any such suit or action shall be made on or before such date, that the principal shall be made a party to any suit or action, and be served with process commencing the same if the principal

can with reasonable diligence be found; that no judgment shall be rendered against the Surety in excess of the penalty of this instrument.

Third. That the Surety shall not be liable for any damage resulting from strikes or labor difficulties, or from mobs, riots, fire, the elements, or acts of God, or for the repair or reconstruction of any work or materials damaged or destroyed by any such causes; nor for damages from injury to person, or for the death of anyone; nor under or by virtue of any statutory provision for damages or compensation for injury to or for the death of any employe; nor for non-performance of any guarantees of the efficiency or wearing qualities of any work done or materials furnished or the maintenance thereof or repairs thereto; nor for the furnishing of any bond or obligation other than this instrument; nor for damages caused by delay in finishing such contract in excess of ten per centum
21 of the penalty of this instrument.

Fourth. That the Obligee shall faithfully perform all the terms, covenants and conditions of such contract on the part of the Obligee to be performed; and shall also retain that proportion, if any, which such contract specifies the Obligee shall or may retain of the value of all work performed or materials furnished in the prosecution of such contract (not less, however, in any event, then ten per centum of such value), until the complete performance by the Principal of all the terms, covenants and conditions of said contract on the Principal's part to be performed that the plans and specifications mentioned in said contract are not in any respect defective, and are and at all times will be kept adequate for the complete performance of such contract, and that no change shall be made in such plans and specifications which shall increase the amount to be paid the Principal more than ten per centum of the penalty of this instrument, without the written consent of the Surety.

Fifth. That no right of action shall accrue upon or by reason hereof, to or for the use or benefit of any one other than the Obligee herein named; and that the obligation of the Surety is, and
22 shall be construed strictly as, one of the suretyship only, shall be executed by the Principal before delivery, and shall not, nor shall any interest therein or right of action thereon, be assigned without the prior consent, in writing, of the Surety.

Signed and sealed, this 28th day of September, 1918.

HARTENFELD BAG COMPANY,
By E. J. HARTENFELD,
Pres.

[Corporate Seal.]

AMERICAN SURETY COMPANY OF NEW YORK,
By JAY J. REYNOLDS,
Resident Vice President.

Attest:
A. C. KOLB,
Resident Assistant Secretary.

Thirtieth. That the said bond was thereupon, on September 28th, 1918, delivered by the Hartenfeld Bag Company to and accepted by defendant, which has ever since had and still has pos-ession of the same.

Thirty-first. That thereafter and on October 3rd, 1918, defendant delivered to the Hartenfeld Bag Company its certified check for $22,-100.00 payable to the Hartenfeld Bag Company, or indorsed to its order, and thereupon received from the Hartenfeld Bag Com-
23 pany its certified check to the order of defendant for $21,-087.20, which check defendant thereafter collected.

Thirty-second. That the defendant and the Hartenfeld Bag Company did not inform plaintiff of such exchange of checks on October 3rd, 1918 and plaintiff had no knowledge or notice thereof until after the Hartenfeld Bag Company had been adjudicated a bankrupt as hereinafter set forth.

Thirty-third. That such delivery by the defendant to the Hartenfeld Bag Company of such certified check for $22,100.00 on October 3rd, 1918, and the receipt thereupon by defendant from the Hartenfeld Bag Company of its certified check for $21,087.20, were not contemplated or intended by the parties at the time it was agreed that the Hartenfeld Bag Company should deliver to defendant merchandise in payment of said alleged indebtedness then due and assumed and to be paid by defendant to the Commercial Credit Company, or at the time of the execution of such pretended contract of September 27th, 1918, or at the time of the execution and delivery by plaintiff of its bond guaranteeing the same, but such exchange of checks was caused by the subsequent fear on the part of defendant and its officers that plaintiff would thereafter discover that the sum of $22,-100.00, as recited in such pretended contract, had not been actually paid; and thereupon defendant and its officers and counsel
24 devised a scheme of exchanging checks in order to be able thereafter to claim that the payment recited in such pretended contract of September 27th, 1918, had been actually made.

Thirty-fourth. That the Hartenfeld Bag Company did not during the period of 75 days set forth in said pretended contract set forth in paragraph Twenty-second, or at any other time, deliver to plaintiff any of the merchandise set forth in said pretended contract excepting bags for which defendant gave the Hartenfeld Bag Company credit for $1,050.00.

Thirty-fifth. That after obtaining the execution and delivery of such pretended contract and plaintiff's bond guaranteeing performance thereof and about October 5th, 1918, defendant acknowledged the receipt of the notice of assignment from the Commercial Credit Company and declared to the Commercial Credit Company that the merchandise covered by such sale of August 29th, 1918 had just been received by defendant, that such merchandise was not in accordance with the contract and that defendant would only pay according to the value of the goods received.

Thirty-sixth. That defendant did not, in accordance with its agreement with the Hartenfeld Bag Company pay to the Commercial Credit Company of Baltimore, the sum of $9,225.00 which it
25 had agreed to pay to said Commercial Credit Company; but, on the contrary, the defendant paid to said Commercial Credit Company, $1,894.52 in cash, charged the Commercial Credit Company $455.48 which it claimed to have expended for its behalf, and rejected 50,000 bags forming part of the merchandise delivered to and received by defendant from the Hartenfeld Bag Company under such invoice of August 29th, 1918, and claimed a credit of $6,875.00 by reason of such rejection.

Thirty-seventh. That on December 12th, 1918 a petition in involuntary bankruptcy was filed against said Hartenfeld Bag Company in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division; that thereafter on December 17th, 1918, a receiver was duly appointed by said Court of the said Hartenfeld Bag Company and its estate; that thereafter and on the 3rd day of January, 1919 the said Hartenfeld Bag Company was duly adjudicated a bankrupt by the said United States District Court for the Northern District of Illinois, Eastern Division upon its consent.

Thirty-eighth. That the said Hartenfeld Bag Company was on September 27th, 1918 and prior thereto and ever since has been insolvent; and plaintiff is informed and believes that the said Hartenfeld Bag Company will not pay any substantial dividend to its creditors.

26 Thirty-ninth. That defendant on September 27th and September 28th, 1918 knew, or had reasonable ground to believe, that the Hartenfeld Bag Company was insolvent.

Fortieth. That the Hartenfeld Bag Company never paid said premium of $221.00 or any part thereof.

Forty-first. That on the 16th day of December 1918, defendant began suit in the Circuit Court of Cook County, Illinois against plaintiff and the Hartenfeld Bag Company upon said bond so executed by plaintiff, and process in that action was duly served upon the plaintiff's representative at Chicago, Illinois, on the 17th day of December 1918, and upon the Hartenfeld Bag Company at Chicago, Illinois, on the 24th day of December 1918; that the defendant herein has filed its declaration in such suit so pending in the Circuit Court of Cook County, Illinois; that it appears by such declaration that such suit is brought to recover against plaintiff and said Hartenfeld Bag Company upon such bond dated September 28th, 1918 the sum of $21,050.00 with interest and costs; that said action is still pending; that the time of the plaintiff herein to plead to such declaration has not expired and plaintiff has not yet filed its plea in that action.

Forty-second. That on December 20th, 1918 the defendant
27 began suit in the Superior Court of Fulton County, Georgia, upon such bond dated September 28th, 1918, to recover the

sum of $21,050.00 and interest and costs, naming plaintiff and the Hartenfeld Bag Company as defendants therein; that the summons and a copy of the petition in such action were served upon plaintiff's representative herein at Atlanta, Georgia, on or about December 21st, 1918; that said action is still pending and undetermined; that the time within which the plaintiff herein may plead to such suit has not yet expired and the plaintiff herein has not pleaded thereto; that the Hartenfeld Bag Company is not within the jurisdiction of the Superior Court of Fulton County, Georgia, and the said Sheriff of Fulton County, Georgia, has made return that process cannot be served upon said Hartenfeld Bag Company in such action within the jurisdiction of that Court.

Forty-third. That plaintiff will be put to great expense and trouble in defending such diverse suits at widely separated points and in securing the presence of witnesses both in Chicago and in Atlanta necessary to establish plaintiff's evidence therein.

Forty-fourth. That the invalidity of such bond so sued upon by the defendant in such suits in Cook County, Illinois and Fulton County, Georgia, does not appear upon the face thereof.

Forty-fifth. That plaintiff fears that defendant may institute other and further suits upon such bond in other jurisdictions wherein plaintiff is liable to the service of process.

Forty-sixth. That no action or proceeding has been brought by defendant against plaintiff in the State of New York to recover upon such bond.

Forty-seventh. That the plaintiff has no adequate remedy at law and can obtain no adequate relief in the Courts of Law in the premises.

Wherefore, plaintiff demands judgment against defendant that it be adjudged and decreed that the bond or undertaking dated September 28th, 1918 and executed by the plaintiff and the Hartenfeld Bag Company, conditioned for the faithful performance by the Hartenfeld Bag Company of the terms to be performed by said Hartenfeld Bag Company under said alleged contract of September 7th, 1918, and the agreement or contract under which plaintiff executed and delivered such bond, be rescinded, cancelled and set aside; that the defendant be ordered and directed to surrender said bond dated September 28th, 1918 to plaintiff; that defendant be restrained and enjoined, during the pendency of this action and permanently, from maintaining any suit or action in any Court against the plaintiff to recover on such bond, and particularly from prosecuting further the suits now pending in the Circuit Court of Cook County, Illinois and the Superior Court of Fulton County, Georgia, and described in this complaint; and that the plaintiff have such other and further relief against defendant as

may be proper and equitable in the premises besides the costs of this action.

HENRY C. WILLCOX,
Plaintiff's Attorney.

Office & P. O. Address, 96 Broadway, Borough of Manhattan, New York, N. Y.

30 STATE OF NEW YORK,
County of New York, ss:

Richard Deming, being duly sworn, deposes and says; that he is Vice-President of the plaintiff above named; that he has read the foregoing complaint and knows the contents thereof; that the same is true of deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief and that as to such matters he believes it to be true; that this verification is made by deponent because plaintiff is a domestic corporation of which deponent is Vice-President.

RICHARD DEMING.

Sworn to before me this 27th day of February, 1919.

L. BRINKERHOFF,
Notary Public.

Richmond County No. 72.
New York County No. 1.
Commission Expires March 30, 1919.

31 *Notice of Motion to Dismiss.*

United States District Court, Southern District of New York.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff,

against

AMERICAN MILLS COMPANY, Defendant.

SIR:

Please take notice, that upon the affidavit of Henry Uttal hereto annexed duly verified the 25th day of April 1919, and the affidavit of Herbert J. Haas, duly verified the 23rd day of April 1919, and upon the complaint herein, which was filed in the office of the Clerk of this Court on March 26th, 1919, and the answer which was filed on April 25th, 1919, and upon all the pleadings and proceedings had herein, the undersigned will move this court on Friday May 2nd, 1919, at a Term thereof for the hearing of motions to be held in Room 235 of the United States Post Office Building, at the opening of Court on that day, or as soon thereafter as counsel can be

heard, for an order dismissing the complaint herein with
32 costs for the reasons set forth in the attached affidavits and for such other and further relief in the premises as may be just.

Dated, April 25th, 1919.

Yours, etc.,

HENRY UTTAL,
Defendant's Attorney.

32 Broadway, New York City.

To Henry C. Wilcox, Esq., Plaintiff's Attorney, 96 Broadway, New York City.

33 *Affidavit of Henry Uttal.*

United States District Court, Southern District of New York.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff,

against

AMERICAN MILLS COMPANY, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Henry Uttal being duly sworn says:

He is the attorney for the defendant herein, a corporation organized under the laws of the State of Georgia. That on March 3rd, 1919, this action was commenced in the Supreme Court of the State of New York, New York County, by service of the summons and complaint upon the defendant. The action is brought for the cancellation of a certain bond set forth in the complaint executed by the plaintiff on or about September 27th, 1918, guaranteeing the performance of a certain contract by one Hartenfeld Bag Company with this defendant, the basis of the plaintiff's claim for
34 cancellation being that said bond was procured by fraud and misrepresentations alleged to have been practiced by this defendant. As appears from the complaint, plaintiff is a domestic corporation, and on September 24th, 1919, defendant filed in the Supreme Court, New York County, a petition for removal of this cause to this Court, together with a bond therefor, duly approved. That thereafter, and on or about March 26th, 1919, plaintiff caused to be filed in this court a certified record of all the proceedings had in said Supreme Court of the State of New York, and served notice thereof on deponent on March 26th.

Upon information and belief that on December 16th, 1918 defendant began suit in the Circuit Court of Cook County, Illinois against this plaintiff and the said Hartenfeld Bag Company upon the aforesaid bond, alleging that said Hartenfeld Bag Company had failed to perform its said contract with this defendant, and asking judgment against plaintiff on said bond and contract and said action

is still pending. Upon information and belief that defendant in that action, plaintiff here, has filed its answer, wherein is set forth as a defense thereto the matters alleged in the complaint herein; a copy of said answer is annexed as Exhibit "D" to the answer filed in this action.

Upon information and belief that on December 20th, 1918 defendant began suit in the Superior Court of Fulton County, Georgia, against this plaintiff upon the aforesaid bond, alleging that
35 said Hartenfeld Bag Company had failed to perform its said contract with this defendant, and asking judgment against plaintiff on said bond and contract and said action is still pending. Upon information and belief that defendant in that action, plaintiff here, has filed its answer, wherein is set forth as a defense thereto, the matters alleged in the complaint herein, a copy of said answer is annexed as Exhibit "E" to the answer filed in this action; and a certified copy thereof is at-ached to the affidavit of Herbert J. Haas, annexed hereto.

That defendant has set up as two separate and distinct defenses to the cause of action set forth in the complaint herein, the commencement and pendency of the aforesaid actions, as will more fully appear by the answer of the defendant, duly filed herein.

That the subject matter of this action, and of both actions commenced by this defendant against this plaintiff, as hereinabove set forth, is the same, to wit the bond heretofore and on or about September 27th, 1918, executed by plaintiff, and the parties to said several actions are the same in so far as the enforcement of the bond is concerned, the only difference being that the said Hartenfeld Bag Company, the principal in said bond, was not made a party to this action.

As will appear from the answers of the plaintiff here to the aforesaid actions pending in Illinois and Georgia, in which it is defendant and from the complaint herein, plaintiff has set up as
36 an alleged cause of action for equitable relief in this action, subject matter, which not only could they assert as defenses in the two actions aforesaid, but which they actually have set up as defenses to those two suits.

As will appear from the affidavit of Herbert J. Haas, attached hereto, the Superior Court of Fulton County, Georgia, has jurisdiction to hear and determine such equitable defense.

Wherefore deponent prays for an order dismissing the complaint herein with costs on the ground that plaintiff has an adequate remedy at law, and that there is no ground for the equitable relief prayed for in the complaint and for such other and further relief as may seem just and proper; for which no previous application has been made herein.

HENRY UTTAL

Sworn to before me this 25th day of April, 1919.

J. FRANKLIN TAUSCH,
Commissioner of Deeds, City of New York.

37 *Affidavit of H. J. Haas.*

United States District Court, Southern District of New York.

AMERICAN MILLS COMPANY, OF NEW YORK, Plaintiff,

vs.

AMERICAN SURETY COMPANY Defendant.

STATE OF GEORGIA,
County of Fulton, ss:

HERBERT J. HAAS, being duly sworn, says:

That he is an attorney and counsellor at law duly admitted to practice as such in the courts of the State of Georgia. That on December 20th, 1918, the American Mills Company, a Georgia corporation, commenced in the Superior Court of Fulton County, Georgia, an action against the American Surety Company of New York, the plaintiff herein. In said action deponent represents the American Mills Company as its attorney. That said action was brought to recover a money adjustment against said Surety Company, upon a bond executed by it to the American Mills
38 Company, for the faithful performance by the Hartenfeld Bag Company of a contract with the said American Mills Company.

On the 19th day of March, 1919, the plaintiff herein, defendant in the action pending in Georgia, as aforesaid, filed its answer to the complaint of the American Mills Company and in said answer sets up an equitable defense thereto. Attached to this affidavit is a copy of said answer certified by the Clerk of the Superior Court of Fulton County, Georgia, under the acts of Congress. (Printed at page 472 of this record.)

Pursuant to the Civil Code of the State of Georgia, 1910, Sections 5406, 5410 and 5412, the Superior Courts of the State of Georgia are vested with jurisdiction to determine equitable and legal rights and for the enforcement of equitable and legal remedies.

Section 5406 is as follows:

Equitable or legal rights, remedies applied. The superior courts of this state, on the trial of any civil case, shall give effect to all the rights of the parties, legal or equitable, or both, and apply on such trial remedies or relief, legal or equitable, or both, in favor of either party, such as the nature of the case may allow or require.

Section 5410 is as follows:

Equitable relief for defendants. A defendant to any suit
39 or claim in the superior court, whether such suit be for legal or equitable relief, may claim legal or equitable relief, or

both, by framing proper pleadings for that purpose, and sustaining them by sufficient evidence.

Section 5412 is as follows:

Extraordinary equitable remedies in aid of suit or defense. Whenever any extraordinary relief or remedy as known in courts of equity is claimed in aid of any action or defense, the same may be claimed from the superior courts, or judges thereof, either in the original petition and answer, or by amendment thereto by special petition and pleading for that purpose.

Under said sections a defendant to any suit or claim in the superior court, whether suit be for legal or equitable relief, may claim legal or equitable relief, or both, upon the filing of the proper pleadings for that purpose and sustaining them by sufficient evidence. The Supreme Court of Georgia, the highest tribunal in the State, in the case of McCall vs. Fry, 120 Ga., page 661, has held that the defendant in a suit in the superior court is bound to set up all defenses that he has to the suit, either legal or equitable and to pray for all the relief needed in aid thereof, ordinary or extraordinary, and he cannot at will decline to litigate as a defendant over these matters and bring an independent suit against his adversary who has already brought him into court.

HERBERT J. HAAS.

Sworn to and subscribed before me this 23rd day of April, 1919.

[SEAL.] D. A. COHEN,

Notary Public, Fulton County, Georgia.

Affidavit of H. C. Willcox in Opposition to Motion to Dismiss.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

United States District Court, Southern District of New York.

In Equity.

16-36.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff,

against

AMERICAN MILLS COMPANY, Defendant.

Henry C. Willcox, being duly sworn, says that he is the attorney for the plaintiff in the above entitled action; that this action was commenced by service of summons and complaint on defendant's president on the 3rd day of March, 1919, that issue was joined herein by service of the defendant's answer April 25th, 1919, and after the action had been removed from the State Court to this court; that by its said answer defendant pleads a counterclaim alleged to

have arisen in defendant's behalf against plaintiff by reason of the bond described in plaintiff's complaint, which bond it is sought by plaintiff to have set aside on the ground that it was obtained
42 by fraud; that because of such counterclaim plaintiff was required to reply, and replied, by service of a verified reply on May 1st, 1919, so that the action is at issue not only as to plaintiff's cause of action, but as to defendant's counterclaim; such reply is presented to the court as part of this affidavit.

That as to the action by the defendant herein brought against the plaintiff herein in the Superior Court, Fulton County, Georgia, which it is now claimed is a bar to this suit, the Surety Company did not appear therein and plead its defense until after this action had been begun, so that the defense pleaded in the Georgia suit, which is now claimed to be a bar to the present action, was not pleaded in Georgia until after this action was brought.

That as to the action at law by the defendant herein commenced against the plaintiff herein in the Circuit Court of Cook County, Illinois, deponent is advised by Illinois counsel and verily believes, that under the laws and practice of Illinois such Circuit Court of Cook County is without jurisdiction to grant the defendant therein (the plaintiff herein) any equitable relief in an action at law. That deponent is also informed by Illinois counsel and verily believes that the American Mills Company, at the time of the commencement of such action, had not and has not now any representative within the State of Illinois upon whom process might be
43 served, in an action in equity in that state to set such bond aside.

HENRY C. WILLCOX.

Sworn to before me this 8th day of May, 1919.

[SEAL.] HORACE P. HOLLISTER,
Notary Public, Westchester County.

Certified filed in New York and Kings Counties.
New York County No. 53. Register's No. 1171.
Kings County No. 62. Register's No. 1028.
My Commission expires March 30, 1921.

44 *Order Denying Motion to Dismiss.*

At a Stated Term of the United States District Court for the Southern District of New York, Held at the Court House and Post Office Building, in the Southern District of New York, this 9th Day of May, 1919.

Present: Honorable Julius M. Mayer, United States District Judge.

In Equity.

16-36.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff,

against

AMERICAN MILLS COMPANY, Defendant.

Defendant in above entitled action having moved to dismiss plaintiff's complaint therein and such motion coming on to be heard,

Ordered, that defendant's said motion so to dismiss plaintiff's complaint be, and the same hereby is, denied without prejudice to such action as trial judge may deem advisable.

J. M. MAYER,
U. S. D. J.

45 *Answer.*

United States District Court, Southern District of New York.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff,

against

AMERICAN MILLS COMPANY, Defendant.

Defendant, answering the complaint:

1. Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraphs Second, Twelfth, Thirteenth, Fifteenth, Twenty-third, Thirty-eighth, Fortieth, Forty-third and Forty-fifth thereof.

2. Upon information and belief, denies each and every allegation contained in Paragraphs Nineteenth, Twenty-sixth, Thirty-third, Thirty-ninth and Forty-seventh thereof.

3. Denies so much of Paragraph Third thereof, as alleges "for the regular transaction of business."

46 4. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph Tenth thereof, which state "and the Hartenfeld Bag Company thereupon shipped to defendant at Atlanta a carload of merchandise

which the Hartenfeld Bag Company claimed constituted a delivery in accordance with the terms of such contract of sale."

5. Denies each and every allegation contained in Paragraph Seventeenth of the complaint, except that it admits so much thereof as alleges that "and before replying to said notice and on or about September 26th, 1918, the president and general manager of defendant went to Chicago to investigate the condition of the Hartenfeld Bag Company."

6. Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph Eighteenth thereof, except that it denies upon information and belief, so much thereof as alleges "and that the president of said Hartenfeld Bag Company so informed the president and general manager of defendant."

7. Upon information and belief, denies each and every allegation contained in Paragraph Twentieth thereof, except that it admits so much thereof as alleges

"and on or about September 27th, 1918, said Hartenfeld Bag
47 Company prepared a draft of a contract whereby the defendant agreed to purchase and the Hartenfeld Bag Company agreed to sell merchandise as follows:

25,000 Strictly No. 1 Inside Coffee Bags @ 30c. each.

50,000 Strictly No. 1 Gold Medal Bags @ 16c. each.

30,000 lbs. guaranteed strictly No. 1 sewed burlap 40 inch, 8 ounce @ 22c. lb.

F. O. B. Chicago.

Total amount of this contract is twenty-two thousand one hundred dollars ($22,100.00), paid to Hartenfeld Bag Company upon the execution of this agreement, the receipt whereof is hereby acknowledged."

That such draft further provided that the Hartenfeld Bag Company should deliver such merchandise within seventy-five days thereafter and should furnish to defendant a surety bond executed by an approved company of such standing as to be acceptable to defendant in the sum of $22,000.00 guaranteeing the faithful performance by the Hartenfeld Bag Company of the conditions of such apparent contract by the Hartenfeld Bag Company to be performed."

8. Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph Twenty-first thereof, except that it denies, upon information
48 and belief, so much thereof as alleges "in the presence of the president and general manager of defendant."

9. Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph Twenty-second thereof, except that it admits so much thereof as alleges "defendant and the Hartenfeld Bag Company re-drafted, amended and executed such contract in words and figures as fol-

lows:" and further admits that the contract set forth in said paragraph is such redrafted and amended contract.

10. Denies each and every allegation contained in Paragraph Twenty-fourth thereof, except that it admits that at the time of the execution of the contracts referred to in said paragraph, to wit on September 27th, 1918, the said sum of $22,100.00 was not paid.

11. Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph Twenty-fifth thereof, except that it denies so much thereof as alleges "that the written contracts submitted to plaintiff as the basis of the requested bond were mere shams and intended to conceal the real agreement between the parties" "that the real agreement between the parties was that the defendant would take its pay for the alleged antecedent debt and the amount assumed and
49 to be paid by defendant to the Commercial Credit Company in merchandise, provided the Hartenfeld Bog Company could procure a bond from plaintiff that the Hartenfeld Bag Company would perform such contract" "that it was intended by defendant and the Hartenfeld Bag Company that the execution of said pretended contract as set forth in Paragraph Twenty-second of this complaint, as secured by a bond of plaintiff, and without the payment to the Hartenfeld Bag Company of the pretended consideration recited therein, should pay and discharge the indebtedness, claimed and to be assumed, of the Hartenfeld Bag Company to defendant in full" and further denies that the contract referred to was other than what it purported on its face to be, and for greater certainty prays that the original thereof may be produced upon the trial of this action; Defendant admits that it did not disclose to plaintiff "that defendant claimed that the Hartenfeld Bag Company owed defendant $11,862.20; or that the Hartenfeld Bag Company had sold and assigned an account of $9,225.00 against defendant to the Commercial Credit Company and thereafter received notes of defendant in payment thereof and negotiated the same to an innocent purchaser for value."

12. Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph Twenty-seventh, except that it denies so much thereof
50 as alleges "that the real agreement was that defendant should receive merchandise from the Hartenfeld Bag Company in payment of the alleged antecedent indebtedness and the debt assumed and to be paid by defendant to the Commercial Credit Company, provided the Hartenfeld Bag Company could secure a bond from plaintiff guaranteeing the performance by the Hartenfeld Bag Company of such contract" "that the pretended written contract dated September 27th, 1918, and set forth in paragraph Twenty-second of this complaint, was a mere sham and was intended to conceal the real contract between the parties and deceive plaintiff into executing such bond," "that the sum of $22,100.00 as recited in said contract, was never intended to be paid," "that

said pretended contract of September 27th, 1918, as set forth in paragraph Twenty-second of this complaint, as secured by plaintiff's bond, and without the payment of the consideration as therein recited, was intended by said Hartenfeld Bag Company and by defendant to constitute a payment in full by said Hartenfeld Bag Company to defendant of the debt claimed and to be assumed and paid by defendant."

13. Denies each and every allegation contained in Paragraph Twenty-eighth except that it admits that the sum of $22,100.00 was not paid by defendant to the Hartenfeld Bag Company immediately upon the execution of the said contract.

51 14. Denies each and every allegation contained in Paragraph Twenty-ninth of the complaint, except that it admits that on September 28th, 1918, plaintiff executed and delivered the bond or undertaking therein set forth.

15. Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph Thirty-second thereof, except that it denies there was any exchange of checks. It admits that it did not notify plaintiff of the delivery by it to the Hartenfeld Bag Company of its check for $22,100.00 on October 3rd, 1918, and of the receipt by it of the check of $21,087.20 from the Hartenfeld Bag Company on said date.

16. Admits all of the allegations contained in Paragraph Thirty-sixth, except that it denies so much thereof as alleges "in accordance with its agreement with the Hartenfeld Bag Company" and "which it had agreed to pay to the said Commercial Credit Company."

17. Denies each and every allegation contained in Paragraph Forty-fourth of the complaint, and alleges that said bond is a valid, legal and binding obligation.

For a first separate and distinct defense to the cause of action alleged in the complaint, defendant alleges:

18. That on or about December 16th, 1918, defendant began suit against the plaintiff and The Hartenfeld Bag Company,
52 upon said bond, annexed hereto as Exhibit "B" and hereinafter referred to and made a part hereof, in the Circuit Court of Cook County, Illinois, and duly filed its declaration in said suit to recover upon such bond the sum of $21,050.00, and said suit is still pending.

19. Upon information and belief that thereafter, the plaintiff herein, duly filed its plea or answer to said declaration, copy of which is hereto annexed, marked Exhibit "D" and made a part hereof.

20. That as appears from said plea or answer the plaintiff alleges as a defense that the aforesaid bond was procured by fraud and through false representation of the defendant herein, as will more fully appear in said Exhibit "D."

21. That said Circuit Court has jurisdiction over and power to hear and determine such cause of action and such defense as alleged in the said declaration and said plea or answer.

22. That by reason of the foregoing the plaintiff has an adequate remedy at law in the action now pending in said Circuit Court, as aforesaid.

53 For a second separate and distinct defense to the cause of action alleged in the complaint, defendant alleges:

23. That on or about December 20th, 1918, defendant began suit against the plaintiff in the Superior Court of Fulton County, Georgia, and duly served and filed its petition in said suit upon said bond, annexed hereto as Exhibit "B" and hereinafter referred to and made part hereof; to recover upon said bond the sum of $21,050.00 and said suit is still pending.

24. Upon information and belief that thereafter plaintiff, duly filed its answer in said action copy of which is hereto annexed, marked Exhibit "E" and made a part hereof.

25. That as appears from said answer, the plaintiff alleges as a defense that the aforesaid bond was procured by fraud and through false representation of the defendant herein, as will more fully appear in said Exhibit "D".

26. That said Superior Court has jurisdiction over and power to hear and determine such cause of action and such defense, as alleged in said petition and answer.

27. That by reason of the foregoing the plaintiff has an adequate remedy at law in the action now pending in said Superior
54 Court, as aforesaid.

For a separate and distinct counterclaim to the cause of action alleged in the complaint, defendant alleges:

28. That it is a corporation organized and existing under the Laws of the State of Georgia.

29. Upon information and belief that the plaintiff is a domestic corporation.

30. Upon information and belief that the Hartenfeld Bag Company is a corporation organized and existing under the laws of the State of Illinois.

31. That on or about the 27th day of September, 1918, defendant and the said Hartenfeld Bag Company entered into a contract, a copy of which is attached hereto, marked Exhibit "A" and made a part hereof.

32. That on or about September 28th, 1918, plaintiff executed and delivered to defendant a certain bond or undertaking, a copy of which it attached hereto, marked Exhibit "B" and made a part hereof.

55 33. That the said Hartenfeld Bag Company has delivered under said contract, on or before seventy-five days from the date thereof, only thirty-five hundred (3,500) strictly number one inside coffee bags, at the contract price of thirty cents (30c) per bag, or ten hundred and fifty dollars ($1,050.00), and no other bags or burlap of any description whatsoever.

34. That the said Hartenfeld Bag Company has failed and refused to return immediately at the expiration of seventy-five days after the date of said contract, or at any other time, to the defendant the sum of twenty-one thousand and fifty dollars ($21,050.00) being the balance of the contract price of twenty-two thousand one hundred dollars ($22,100.00) less the value at the contract price, of merchandise delivered on or before the seventy-five days from the date of said contract, as provided therein; the said Hartenfeld Bag Company having failed and refused to deliver to the plaintiff within the said specified time all of the merchandise to be by it delivered under said contract within said specified time, it having delivered only thirty-five hundred (3,500) strictly number one inside coffee bags on or before seventy-five days from the date of the contract, as aforesaid.

56 35. That by reason of the above facts, the said Hartenfeld Bag Company and the plaintiff became indebted to the defendant, under said bond or undertaking for said sum of twenty-one thousand and fifty dollars ($21,050.00).

36. That on December 14th, 1918, defendant, through its duly authorized agent, by registered mail, notified the plaintiff of the default of the said Hartenfeld Bag Company under said contract and bond, and demanded payment of said sum of twenty-one thousand and fifty dollars ($21,050.00), a copy of which notice is hereto attached, marked Exhibit "C" and made a part hereof.

37. That demand for payment of said sum has been made by the defendant of the plaintiff and said Hartenfeld Bag Company, and they both have refused and still refuse to pay the same, or any part thereof.

38. That the defendant has duly performed all the conditions of said bond or undertaking, and said contract on its part to be performed.

Wherefore defendant demands judgment dismissing the comlpaint with costs; and for affirmative judgment against the plaintiff, on defendant's counterclaim, for the sum of Twenty-one thousand
57 and fifty dollars ($21,050.00), with interest thereon from the 14th Day of December, 1918, with costs.

AMERICAN MILLS COMPANY,
By SIMON MILLER,
Vice-President.

HENRY UTTAL,
Attorney for Defendant.

Office and P. O. Address, #32 Broadway, Borough of Manhattan, New York City.

STATE OF NEW YORK,
County of New York, ss:

Simon Miller, being duly sworn, deposes and says:

That he is the Vice-President of the American Mills Company, the defendant in the above-entitled action, that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be -rue. Deponent further says that the
58 reason why this vertification is not made by the defendant and is made by him is that defendant is a foreign corporation, organized under the laws of the State of Georgia; and the sources of deponent's information and the grounds for his belief as to all matters not therein stated upon his knowledge are as follows:

Statements and reports of other officers and employes of defendant company, documents and correspondence, and the complaint herein.

SIMON MILLER.

Sworn to before me this 24th day of April, 1919.

J. FRANKLIN TAUSCH,
Commissioner of Deeds of the City of New York, Residing in Kings County.

Certificate filed in New York County, No. 47.
Certificate filed Register New York County No. 19019.
Certificate filed Register Kings County No. 9013.
Certificate filed in Queens County No. 2529.
Certificate filed in Bronx County No. 9005.
Commission expires May 21, 1919.

59 Exhibit "A" annexed to original answer herein is printed in this record at page 10 as contained in paragraph 22 of the complaint.

Exhibit "B" annexed to original answer herein is the bond printed in this record at page 18 as contained in paragraph 29 of the complaint.

Exhibit "C" annexed to original answer herein is printed in this record at page 508 as part of Defendant's Exhibit A.

Exhibit "D" annexed to original answer herein is printed in this record at page 523 as Defendant's Exhibit C.

Exhibit "E" annexed to original answer herein is printed in this record at page 472 as part of Defendant's Exhibit A.

60 *Reply.*

United States District Court, Southern District of New York.

Equity. No. 16-36.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff,

against

AMERICAN MILLS COMPANY, Defendant.

Plaintiff, replying to the counterclaim contained in defendant's answer:

First. Denies the allegations of the paragraph numbered 31, except that it admits that defendant and the Hartenfeld Bag Company went through the form of making an alleged contract, a copy of which is marked "Exhibit A" and attached to said answer.

Second. Denies any knowledge or information sufficient to form a belief as to the allegations of the paragraph numbered 33, except that it admits that the Hartenfeld Bag Company delivered merchandise to defendant for which defendant gave the Hartenfeld Bag Company credit for $1,050.00.

61 Third. Denies any knowledge or information sufficient to form a belief as to the allegations of the paragraph numbered 34, except that plaintiff denies that it was ever the intention of the parties to the contract therein referred to that the Hartenfeld Bag Company should pay any money to defendant, and except plaintiff admits that the Hartenfeld Bag Company delivered merchandise to defendant for which defendant gave the Hartenfeld Bag Company credit for $1,050.00.

Fourth. Denies the allegations of the paragraphs numbered 35 and 38.

Fifth. Admits that defendant sent the plaintiff a notice, a copy of which is marked "Exhibit C" and attached to such answer, and except as herein admitted, denies the allegations contained in the paragraph numbered 36.

Sixth. Admits that defendant has made demand upon plaintiff for the payment of $21,050.00, and that plaintiff has not paid the same; and denies any knowledge or information sufficient to form a belief as to the other allegations of the paragraph numbered 37.

Plaintiff further replying to such counterclaim, for a first, separate and distinct defense thereto, alleges:

Seventh. That at and prior to the execution of the pretended contract "Exhibit A" attached to such counterclaim and the exe-
62 cution of the bond "Exhibit B" attached to such counterclaim, the Hartenfeld Bag Company was indebted to defend-

ant in large sums of money, and defendant becoming apprehensive as to its ability to collect said debt, Armand May, president of defendant, went to Chicago in the latter part of September, 1918, for the purpose of securing a settlement of said indebtedness; that thereupon said May was informed by E. J. Hartenfeld, as president of the Hartenfeld Bag Company, that said debt could not be paid nor secured, nor any part thereof paid or secured, as the Hartenfeld Bag Company had no money or security with which to pay or secure the same.

Eighth. That at the same time such Hartenfeld Bag Company had assigned to the Commercial Credit Company of Baltimore an account of $9,225.00 due from defendant to said Hartenfeld Bag Company and thereafter obtained negotiable promissory notes from defendant in payment of such account and discounted such notes with Foreman Brothers Banking Company, an innocent purchaser for value, and the Commercial Credit Company of Baltimore thereafter notified defendant of such assignment and demanded payment of such amount (thus already paid) from defendant when it should become due.

Ninth. That the said Armand May, acting for defendant, and the said E. J. Hartenfeld, acting for the Hartenfeld Bag Com-
63 pany, then entered into an agreement that the Hartenfeld Bag Company should pay to defendant the indebtedness claimed to be due from the Hartenfeld Bag Company to defendant, as well as the sum of $9,225.00 due from the Hartenfeld Bag Company to the Commercial Credit Company of Baltimore, Maryland, and amounting in all to the sum of $21,087.20, by the delivery of burlap and bags to defendant within seventy-five days thereafter at prices agreed upon between the said Hartenfeld and the said May, providing the Hartenfeld Bag Company did secure the bond of this plaintiff, the American Surety Company, guaranteeing the delivery of such bags and burlap within such 75 days.

Tenth. That thereupon the said E. J. Hartenfeld, acting on behalf of the Hartenfeld Bag Company, and the said Armand May, acting on behalf of defendant, prepared the alleged contract attached to such answer, defendant's "Exhibit A," with the intent and purpose of concealing from this plaintiff the real agreement between the parties as alleged in paragraph ninth of this reply, as well as in the complaint herein; and such contract "Exhibit A" was executed by the parties thereto with the intention of making it appear that the transaction was a sale in consideration of a present cash payment to the Hartenfeld Bag Company of the amount recited therein, namely, $22,100.00, in order that plaintiff might thereby be deceived and induced to execute the bond "Exhibit B."

64 Eleventh. That said contract "Exhibit A" was not entered into in good faith by the parties thereto, in that it never was intended that the American Mills Company should pay to the Hartenfeld Bag Company the sum of $22,100.00, as set forth therein or any other sum, but that the Hartenfeld Bag Company should de-

liver the merchandise described in the said contract to defendant in payment of its past due indebtedness and the payment assumed by defendant to the Commercial Credit Company.

Twelfth. That thereupon the said contract, "Exhibit A," was presented to the plaintiff at Chicago, and the said Hartenfeld Bag Company, with the knowledge and acquiescence of Armand May, the president of the defendant, applied to the plaintiff to execute a bond thereon.

Thirteenth. That thereupon and on or about September 28th, 1918, plaintiff, relying upon the representations contained in said contract, and particularly upon the representation that the transaction between the parties was a bona fide sale of the merchandise therein described with an immediate cash payment by defendant to the said Hartenfeld Bag Company of the sum of $22,100.00, and believing the same to be true, and without any knowledge or reason to believe that such contract was a mere cloak and pretense to conceal that the merchandise described in such contract was to be delivered by the Hartenfeld Bag Company in payment of an antecedent indebtedness and of the sum assumed and to be paid by de-
65 fendant to the Commercial Credit Company of Baltimore, executed the bond attached to such answer and marked "Exhibit B."

Fourteenth. That the consideration in such alleged contract "Exhibit A", $22,100.00 was never paid or intended to be paid by defendant, but on October 3rd, 1918, thereafter the officers of defendant, having become apprehensive that plaintiff would discover that the consideration recited in the alleged contract "Exhibit A" had not been paid, went through the form of exchanging checks with the Hartenfeld Bag Company so that the defendant paid the Hartenfeld Bag Company its check for $22,100.00 in exchange for the check of the Hartenfeld Bag Company for $21,087.20.

Fifteenth. That the Hartenfeld Bag Company did not have on October 3rd, 1918, the sum of $21,087.20 to its credit in any bank and could not have paid such sum to defendant except by an exchange of checks with defendant.

Sixteenth. That plaintiff did not learn that the alleged contract "Exhibit A" was a fraud and sham as herein set forth, or that it was intended to conceal a delivery of merchandise in payment of an antecedent debt and to reimburse defendant for paying the account to the Commercial Credit Company, or that the sum of $22,-
100.00 therein recited was not paid or intended to be paid or
66 that there had thereafter been an exchange of checks as herein alleged, until after December 15th, 1918.

Seventeenth. That if plaintiff had known that such contract was a mere cover for an agreement to deliver the merchandise therein described in payment of an antecedent debt and in payment of a sum to be paid by defendant to the Commercial Credit Company, or that the consideration of $22,100.00 therein recited had not been

paid, plaintiff would not have executed or delivered the bond "Exhibit B".

Eighteenth. Plaintiff re-alleges as part of this defense the allegations contained in the complaint herein.

Plaintiff further answering for a second, separate and distinct defense, alleges:

Nineteenth. That the Hartenfeld Bag Company is not a party to this suit and cannot be served with process herein so as to make it a party hereto; that the said Hartenfeld Bag Company is a foreign corporation organized under the Laws of the State of Illinois and can be served with process in the State of Illinois.

67 Twentieth. That it is provided in such bond "Exhibit B" that no suit or action thereon shall be brought after December 24th, 1918, and that the principal, Hartenfeld Bag Company, shall be made a party to any such suit and be served with process if the principal can with reasonable diligence be found.

Twenty-first. That on December 16th, 1918, defendant began suit in the Circuit Court of Cook County, Illinois, which is a Court of general jurisdiction, against plaintiff and the Hartenfeld Bag Company upon such bond "Exhibit B"; and process in that action was duly served on plaintiff and upon said Hartenfeld Bag Company within the jurisdiction of that Court; that it appears by the declaration of the plaintiff therein (defendant herein) that such action is brought to recover upon the same cause of action which is the basis of defendant's counterclaim herein; that such action in the Circuit Court of Cook County, Illinois is still pending and undetermined.

Wherefore, plaintiff demands judgment that the counterclaim be dismissed with costs and that plaintiff have the relief prayed for in the complaint herein.

HENRY C. WILLCOX,
Plaintiff's Attorney.

Office & P. O. Address, 96 Broadway, Borough of Manhattan, New York, N. Y.

68 STATE OF NEW YORK,
County of New York, ss:

Earle F. Watson, being duly sworn, deposes and says: that he is vice-president of the plaintiff above named; that he has read the foregoing reply and knows the contents thereof; that the same is true of deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to such matters he believes it to be true; that this verification is made by deponent because plaintiff is a domestic corporation of which deponent is vice-president.

EARLE F. WATSON.

Sworn to before me this 1st day of May, 1919.
[SEAL.] HORACE P. HOLLISTER,
Notary Public, Westchester County.

Certificate filed in New York and Kings Counties.
New York County No. 53. Register's No. 1171.
Kings County No. 62. Register's No. 1028.
My Commission expires March 30, 1921.

69 *Notice of Application for Final Decree.*

United States District Court, Southern District of New York.

In Equity.

No. 16-36.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff,

against

AMERICAN MILLS COMPANY, Defendant.

SIR:

Please to take notice that upon the summons, complaint, answer and reply in above entitled cause, application will be made at a stated term of the United States District Court for the Southern District of New York for the hearing of motions in equity, to be held in the United States Post Office and Court House Building in the Borough of Manhattan in the Southern District of New York, on the 23rd day of May, 1919, at ten o'clock in the forenoon, for a final decree in favor of plaintiff for the relief demanded in the complaint and for such other and further relief as may be just.

Dated, New York, May 16, 1919.

Yours, &c.,

HENRY C. WILLCOX,
Attorney for Plaintiff.

To Henry Uttal, Esq., Attorney for Defendant, #32 Broadway, New York City, N. Y.

70 *Opinion of Judge Mayer.*

United States District Court, Southern District of New York.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff,

against

AMERICAN MILLS COMPANY, Defendant.

Memorandum.

Heretofore the defendant moved to dismiss the bill upon the ground that plaintiff had failed to state a cause of action in Equity.

On oral argument, I denied the motion without prejudice to such action as the judge trying the case might deem advisable. I pointed out that under the present practice, if the cause seemed to be at law instead of in equity, the procedure was not to dismiss but to transfer the cause to the law side. No matter how a pleading is drawn, it often happens in the course of the trial that the judge can much more clearly and satisfactorily determine whether the cause is at law or in equity than can the judge on motion calendar.

On further consideration of this motion, however, I am satisfied that the complaint states a cause of action in equity. Motion
71 to dismiss denied without prejudice.

Plaintiff later moved for a final decree on the pleadings. Both counsel have carefully and elaborately discussed the legal effect of alleged fraudulent representations and concealment set forth in the complaint, but the difficulty is that the denials of the answer place in issue allegations as to antecedent transactions which, for the purposes of this motion must be regarded as denied. After careful analysis, all that survives is the allegation in respect of the contract set forth in allegation twenty-second. In that contract it appears as follows:

"Total amount of this contract is twenty-two thousand one hundred dollars ($22,100.00), paid to Hartenfeld Bag Company upon the execution of this agreement, the receipt whereof is hereby acknowledged."

It is alleged and admitted that this amount of $22,100.00 was not paid upon the execution of the agreement.

Plaintiff, however, alleges in the twenty-fourth allegation of the complaint, "that the statements and representations contained in the pretended contracts set forth in paragraphs Twentieth and Twenty-second of this complaint" were false, etc. Referring to allegation Twentieth, it will be noted that the essential allegations therein set forth are denied in the answer. Thus, the alleged false representations and concealment upon which on the theory of the com-
72 plaint the plaintiff relied, are in part denied. There are other denials so that all that the complaint in its present shape as answered amounts to, is that the statement that the $22,100.00 was paid upon the execution of the agreement was false, etc., and that plaintiff relied upon this representation, etc., in executing and furnishing the surety bond. This is not sufficient in the present state of the pleadings to authorize the final decree asked for. It is obvious that, as the complaint is now framed, *that* the plaintiff relied upon more than this representation and whether this representation or concealment standing by itself was material and was solely relied on or constituted the only concealment by reason of which plaintiff can recover, can be developed only on the trial; but on the pleadings plaintiff is not entitled to a final decree and the issues can be determined only after a trial.

It is unnecessary, therefore, to discuss the merits which would merely be indulging obiter. The motion for final decree is denied. Settle order on two days' notice.

July 1, 1919. JULIUS M. MAYER,
District Judge.

73 *Order Denying Motions for Decree and to Dismiss.*

At a Stated Term of the United States District Court for the Southern District of New York Held at the Court House and Post Office Building, in the Southern District of New York, this 3rd Day of July, 1919.

Present: Hon. Julius M. Mayer, United States District Judge.

Equity. 16-36.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff,

against

AMERICAN MILLS COMPANY, Defendant.

This cause came on to be heard at this term and was argued by counsel and thereupon upon consideration thereof it was

Ordered, adjudged and decreed as follows, viz: that plain-
74 tiff's motion for a final decree on the pleadings for the relief demanded in the complaint be, and the same hereby is, denied and that defendant's motion to dismiss plaintiff's complaint be, and the same hereby is, denied without prejudice to such action as trial judge may deem advisable.

J. M. MAYER,
U. S. D. J.

75 CASE.

Testimony to be Incorporated into Printed Record on Appeal in Case of American Surety Company vs. American Mills Co.

This action was tried November 20, 1919, before Hon. J. C. Ross, District Judge.

Appearances:

Henry C. Willcox, Esq., Solicitor for Plaintiff. Allan C. Rowe, of Counsel.

Henry Uttal, Esq., Solicitor for Defendant. Hamilton Moses, of Counsel.

Stipulated that plaintiff is licensed to do business in every State and that it has an agent for service in every State.

The depositions of the following witnesses were then read:

76 Depositions Taken at Chicago, Ill., August 12th, 1919.

FRANK B. WOLTZ, called as a witness on behalf of the American Surety Company of New York, plaintiff, having been duly sworn, testified by deposition as follows:

Direct examination.

By Mr. Rowe:

I am in the banking business, connected with Foreman Brothers Banking Company of Chicago, Ill., a banking corporation incorporated under the Laws of the State of Illinois, as auditor, and have been connected with them for nine years.

In September and October, 1918, the Hartenfeld Bag Company had an account with Foreman Brothers Banking Co. On September 17th, 1918, our bank discounted for the Hartenfeld Bag Company two notes of the American Mills Company, to the order of Hartenfeld Bag Company, one for $4,650 due December 18th, 1918, and one for $4,485.08 due January 6th, 1919, which notes were paid, the first one in December 21st, 1918, and the second one on January 9th, 1919; that is the dates payment was received; the notes were payable out of town and probably took one or two days in transit. The proceeds of these notes were credited to Hartenfeld Bag Company's account. On October 3rd there was deposited an
77 amount of $22,094.45. The photostatic copy of the check dated October 1, 1918, drawn by the American Mills Company of Atlanta upon the Third National Bank of Atlanta, Georgia, signed by L. G. Strauss, Treasurer, and countersigned by A. May, President, to the order of Hartenfeld Bag Company for $22,100.00, and which bears upon the back stamped endorsement: "Pay to the order of any bank or banker. All prior endorsements guaranteed. October 3rd, 1918. Foreman Brothers Banking Company, Chicago, Ill., John Terbergh, Cashier;" and also bearing the endorsement of "Hartenfeld Bag Company, Edward J. Hartenfeld, Treasurer;" is a photostatic copy of a check of that nature deposited in Foreman Brothers' Banking Company to the credit of the Hartenfeld Bag Company on October 3rd, 1918.

Photostatic copy of American Mills Company's check of Oct. 1, 1918, identified by witness marked Plaintiff's Ex. 1 for identification of August 12, 1919.

Witness: On October 3rd, 1918, a check now shown me drawn by the Hartenfeld Bag Company dated October 3rd, 1918, on Foreman Brothers Banking Company, Chicago, to the order of the American Mills Company for $21,087.20, and stamped on the face "Accepted payable through Chicago Clearing House, October 3rd, 1918, Foreman Brothers Banking Company," was certified by Foreman Brothers Banking Company. That check was subsequently presented and paid by Foreman Brothers Banking Company on October 8th, 1918, through the Chicago Clearing House.

78 Photostatic copy of check of Hartenfeld Bag Co. of Oct. 3, 1918, identified by witness marked Plaintiff's Ex. 2 for identification of August 12, 1919.

Witness: The balance to the credit of Hartenfeld Bag Co. with Foreman Bros. Banking Co., was the following amounts at the open-

ing of the bank on each of the following days: Sept. 27, 1918, $973.25; Oct. 1, 1918, $5,627.57; Oct. 2, 1918, $1,860.85; Oct. 3, 1918, $468.30; Oct. 4, 1918, $4,343.20; Sept. 30, 1918, $3,062.15.

Cross-examination.

By Mr. Moses:

I know that on Oct. 3, 1918, Hartenfeld Bag Co. was indebted to Foreman Bros. Banking Co. To the best of my recollection they were indebted to us both for discounted paper and their direct loans, but I would not say for how much.

I do not know whether the Hartenfeld Bag Company had any limited credit with Foreman Brothers Banking Company on October 3rd, 1918. I believe that they had about that time or previously thereto, issued a statement of financial condition to Foreman Brothers Banking Company, and according to that statement, I believe they were solvent.

Redirect examination.

In answer to Mr. Rowe:

I believe that the difference between the account of Hartenfeld Bag Co. on that day $22,094.45 is made up of our exchange charges $5.55. amount of the check, Plaintiff's Ex. 1 for identification $22,-100. and the amount credited to the —.

79 HAROLD E. FOREMAN, called as a witness on behalf of the American Surety Company of New York, plaintiff, having been first duly sworn, testified by deposition as follows:

Direct examination.

By Mr. Rowe:

I am Vice-President of Foreman Brothers Banking Company. The Hartenfeld Bag Company had an account in our bank in September and October, 1918.

Cross-examination.

By Mr. Moses:

Sometime previous to October 3rd, 1918, Hartenfeld Bag Company issued to our bank a statement showing its credit liabilities and loans, and according to that statement, Hartenfeld Bag Company was solvent.

On October 3rd, 1918, and previously thereto the Hartenfeld Bag Company had a line of credit at our bank up to which they could borrow money from us on their notes. At that time they owed us money and previous to that always had a line of credit. I think we had them reduce their line of credit prior to Oct. 3, 1918. So far as I know they were solvent on October 3rd, 1918, and had been solvent previously to that.

80 EDITH F. SUTTON, called as a witness on behalf of the American Surety Company of New York, plaintiff, having been first duly sworn, testified by deposition as follows:

Direct examination.

By Mr. Rowe:

I am a stenographer and was in the employ of Hartenfeld Bag Company in September and October, 1918. On or about September 27, 1918, Mr. Hartenfeld, President of that company, met Mr. Armand May at the La Salle Hotel, Chicago, and took him to the Kimball Building, Chicago. The stenographer's note book exhibited to me is the shorthand note book of notes containing contract. It is my shorthand. The part in the back of the book is the shorthand notes of the other stenographer. In my notes of September 27th, 1918, there is the dictation of a contract given me by Mr. Hartenfeld in Mr. May's presence. This dictation, which I have stated is a contract, is as follows:

"Contract entered into between American Mills Company Corporation, of Atlanta, Georgia, party of the first part, and the Hartenfeld Bag Company, a corporation, Chicago, Illinois, party of the second part:

American Mills Company agrees to purchase, and the Hartenfeld Bag Company agrees to sell, the following bags at specified
81 prices, subject to specified conditions, as therein contained:

25,000 strictly #1 inside coffee bags @ 30c. each.

50,000 strictly #1 Gold Medal bags @ 16c. each.

30,000 #, guaranteed strictly #1, sewed burlap, 40" 8 oz. @ 22c. a lb., f. o. b. Chicago.

Total amount of this contract is $22,100.00, which the American Mills Company agrees to pay cash upon the condition that this contract is completed within 75 days after date."

There is something scratched out, which was not written in the contract, reading as follows: "The Hartenfeld Bag Company agrees to furnish a surety bond covering the contract." I cannot read these couple of notes under there. It sounds like this, or looks like this: It might be "full total for amount of $22,000.00"; and then Mr. May dictated a telegram on the same day. The last portion, which I read you, was not entered on the contract. Mr. Hartenfeld dictated most of the contract. Mr. May put in a word every once in a while. I don't remember who gave direction to strike out the paragraph last referred to. I transcribed my notes on paper. I made more than one copy. Mr. May said he was going out to see his lawyer in my presence. Mr. May further dictated a telegram to his home office to me, reading:

"American Mills Company, Atlanta, Georgia.

82 Nothing accomplished as yet. Will wire late today or tomorrow definitely.

(Signed) ARMAND MAY."

The carbon copy of the telegram dated September 27th, 1918, shown me, is a carbon of that telegram. The words on the carbon "and hold commercial reply" are in my handwriting. Mr. May made the addition, and said it was not necessary to re-copy it.

Copy of telegram of Sept. 27, 1918, identified by witness marked Plaintiffs Exhibit 3 for Identification of August 12, 1919.

Witness: After these additional words were added I sent off the telegram. Mr. May brought back this contract with some changes made on it. I don't remember the changes, as they were written on the first copy of the contract which Mr. May brought back with him, but they were copied according to what was done when he was over to the lawyer's office.

Cross-examination.

By Mr. Moses:

The American Surety Company were issuing merely surety bonds on contracts that the Hartenfeld Bag Company entered into, two that I know of. In another instance that I know of the American Surety Company entered into a surety bond with the Hartenfeld Bag Company and the American Surety Company got a copy of the contract.

83 WARREN H. BURNS, called as a witness on behalf of the American Surety Company of New York, plaintiff, having been first duly sworn, testified by deposition as follows:

Direct examination.

By Mr. Rowe:

I am now a surety bond underwriter. In September, 1918, I was in the employ of the American Surety Company in its Chicago office. In September 1918, I did not personally know Edward J. Hartenfeld. I had never seen him. On September 27th, 1918, as the result of a telephone message, I went to the office of the St. Clair Mining & Milling Company, in the Kimball building, Chicago, and saw Mr. Hartenfeld in company with a man introduced to me by Mr. Hartenfeld as being the representative of the American Mills Company. Mr. Hartenfeld handed me a contract, a copy of a contract, and stated that he had to have a bond to guarantee this contract, and asked me if I would not arrange to have it executed and delivered back to him the same evening. He advised me that the American Mills Company's man was to leave town that night. I then went back to the office of the American Surety Company, and talked it over with Mr. Reynolds. As far as I can remember I gave the paper to Mr. Reynolds, who is an employe of the American Surety Company, at Chicago.

Cross-examination.

By Mr. Moses:

The American Surety Company had previously to that entered into bonds for the Hartenfeld Bag Company. The Hartenfeld Bag Company did not to my knowledge give any security to the American Surety Company in connection with the bond that was issued for the faithful performance of this contract. If they had given any security I would have known it. The entire transaction between the American Surety Company and the Hartenfeld Bag Company, with reference to this bond, was handled by me, except the execution of the bond itself.

JAY J. REYNOLDS, called as a witness on behalf of the American Surety Company of New York, plaintiff, having been first duly sworn, testified by deposition as follows:

Direct examination.

By Mr. Rowe:

I am resident Vice President of the American Surety Company at Chicago, and have been for six years. I am the Jay J. Reynolds who signed the bond, which is the subject of this suit. I recall the circumstances connected with the execution of the bond. I think it was on Friday morning about September 27th, 1918, that Mr.
85 Hartenfeld, of the Hartenfeld Bag Company, called our office, and said that he wanted a bond, guaranteeing a contract that he was about to enter into, furnishing bags. I personally had a conversation with Mr. Hartenfeld on the telephone, and I told him it would be necessary to see the contract so I sent Mr. Burns of our office to go over and get it and he came back with a draft of a contract and before the bond was drawn Mr. Hartenfeld called up and said they wanted to change it. Mr. Hartenfeld said that the contract had been changed and that he would get a draft of the new contract. The next day I think we got it, on Saturday morning, and some time that forenoon we signed the bond and sent it over to him. The first contract and the second contract were practically identical except for one clause. The first contract provided that they should furnish the bags and the second one provided that they should furnish the bags and that if they did not they should return the money. When I executed the bond for the American Surety Company we had only a copy of the contract which was to be entered into as we understood it. Other than this I had no communication with Mr. May or Mr. Hartenfeld on September 27th or 28th. I never had any conversation with Mr. May at all. I didn't even know him; never heard of him. I was never informed prior to the bankruptcy of the Hartenfeld Bag Co. in December, 1918, by Mr. Hartenfeld or by the Bag Company or by Mr. May or the American Mills Company or by anyone else that the transaction between the Hartenfeld
86 Bag Company and the American Mills Company upon which the bond was executed by the American Surety Company

dated September 27th, 1918, was any other or different from that set forth in the contract of September 27, 1918, between the Bag Company and the Mills Company. I never got any information at any time prior to the bankruptcy of the Hartenfeld Bag Company in December, 1918, from Mr. Hartenfeld, or the Bag Company, or Mr. May, or the Mills Company, or anyone else, that on or about September 27th or 28th, 1918, the Bag Company was indebted to the Mills Company in a large amount, approximately $22,000.00, and that the contract, upon which this suit was brought, was the method adopted by the Bag Company and the Mills Company to secure the delivery of merchandise by the Bag Company to the Mills Company within 75 days thereafter in payment of that debt. We didn't know that the $22,100.00 recited in the contract had not been paid to the Bag Company upon the execution of the agreement. We thought it had been paid. That is one of the things we counted on.

Cross-examination.

By Mr. Moses:

Prior to this transaction the American Surety Company had signed two or three bonds for the Hartenfeld Bag Company. I think perhaps one or two other bonds signed by the American Surety Company for the Hartenfeld Bag Company were con-
87 ditioned upon the faithful performance by the Hartenfeld Bag Company of contracts, which the Hartenfeld Bag Company had entered into with other persons, firms, or corporations. At least one other bond was a Court bond. I knew the Hartenfeld Bag Company only by reputation, except that we had done business with them in the office, and by "reputation" I mean that they were in the bag business in Chicago, and we had, at least we thought we had, information regarding their financial responsibility, and we had signed several bonds for them, and thought that they were. Well, I know they were a corporation and what we generally know about clients that we do business with. I did not know they were solvent. I would not have signed the bond unless I assumed they were. From the information we had we did not know that they were insolvent. Having signed for bonds for them before, and from the rating, which they had, which must have been incorrect in the light of subsequent developments, we assumed that they were all right. Otherwise we would not have signed the bond for them. The credit rating of the company was from R. G. Dun & Company, and, if I recall correctly, it was from $75,000.00 to $125,000.00; that their financial responsibility was from $75,000.00 to $125,000.00 over and above their liabilities. We did not receive an independent financial report from R. G. Dun & Company on the Hartenfeld Bag Company. I got the information as to their finan-
88 cial standing from R. G. Dun & Company's book issued September 1st, 1918. Mr. Jenks, our Manager here, passes on the question of credit with me. I talked it over with Mr. Jenks, and we came to the conclusion that we should sign the bond.

We also discussed it with Mr. J. W. Mason, who was in charge of our underwriting at that time. We had a financial statement from the Hartenfeld Bag Company. It is always customary for the American Surety Company, when issuing bonds of this character and size, to secure from the principal a financial statement of their worth. If we know the people, or think we know them, we don't ask for a financial statement. We thought we knew the Hartenfeld Bag Company. Mr. Maehle, our present Manager, Assistant Manager at that time, had dealt with the Hartenfeld Bag Company before in the issuance of bonds for that company. Mr. Burns was nothing but a messenger boy for me, and probably did not know that the contract, which he brought from Hartenfeld, was the final draft of the contract, which was entered into between the Hartenfeld Bag Company and the American Mills Company. Burns was simply an office boy, that helped us out occasionally, and had nothing to do with underwriting, and had no authority to pass on it. The American Surety Company did not have an original copy of the contract between the Hartenfeld Bag Company and the American Mills Company. If we had a copy of it, and the party told us it was a copy, and we thought we could trust them, as we did in
89 this case, we would execute the bond. It was because of our confidence in the Hartenfeld Bag Company that this bond was entered into. In dealing with the Hartenfeld Bag Company we dealt with Mr. Edward J. Hartenfeld, and to a certain extent it was because we had confidence in Mr. Hartenfeld that we had confidence in the Hartenfeld Bag Company. I read the paper, which purported to be a contract between the American Mills Company and the Hartenfeld Bag Company, on September 27th, 1918, before the American Surety Company executed its bond securing it. I could almost repeat it. I knew that that contract provided that, if the Hartenfeld Bag Company did not deliver the merchandise under the contract mentioned within the period of 75 days after the date of that contract, it would return to the American Mills Company the sum of $22,000.00, the purchase price of that property, and I knew that at the time that the American Surety Company entered into that bond dated September 28th, 1918. The bond was executed and delivered pursuant to the terms and provisions of the contract of September 27th, 1918, between the American Mills Company and the Hartenfeld Bag Company, which required the furnishing of a bond, securing the payment, and guaranteeing the faithful performance of the terms of that contract. The bond was issued on that particular contract alone. That is the only one we had any information about. We did not inquire of Mr. Hartenfeld whether any of the sum of $22,100.00 mentioned in the contract of
90 September 27th, 1918, had been paid. We assumed that that was a condition precedent to the making of our bond binding. I don't remember exactly from the wording of the contract that the performance of the contract was conditioned upon the securing of the bond before the money was to be paid. I thought the $22,100.00 was to be paid immediately. I still think so. By "immediately" I mean the money was to be paid and the bond given practically

simultaneously, all the same transaction, practically simultaneously. I understood that, when the bond was executed, the money was to be paid for the merchandise. I thought that the Hartenfeld Bag Company had entered into a contract to produce bags immediately, and that Mr. Hartenfeld needed the money; that it was a big deal, like all contracts are often let, and that the money was advanced to him, and they wanted security, and that they would turn over everything immediately upon giving the bond, so that he could go ahead with the contract. The bond was to be secured, and the money was to be passed, simultaneously as one transaction. I did not meet anyone representing the American Mills Company in this transaction unless Burns met somebody of the American Mills Company in Mr. Hartenfeld's office. So far as I know, only from hearsay no one representing the American Surety Company met a representative of the American Mills Company in this transaction. The

91 American Surety Company had no security from the Hartenfeld Bag Company on September 28th except their application and general contract, which we have signed generally, when we have several bonds for one person. We secured no deposit of money or other security, and since that date no money or security has been deposited with the American Surety Company by the Bag Company on the bond in question. We hold some mining stock deposited by the Hartenfeld Bag Company, which I believe was given in connection with a Court bond. I do not know the name of it, but it is a mining concern, in which Mr. Hartenfeld is interested. I understand it is practically worthless. This is the financial statement, which was issued by the Hartenfeld Bag Company, which I find in the file of the American Surety Company. It is dated before the bond.

Witness: I have never seen any other financial statement issued by the Hartenfeld Bag Company on or before September 27, 1918, other than the paper of which American Mills Company's Exhibit 1 for identification of August 13, 1919, is presumed to be a copy.

Financial statement of Hartenfeld Bag Company, dated August 31, 1917, received in evidence and marked Defendant's Exhibit 1 of August 13, 1919.

92 EDWARD J. HARTENFELD, called as a witness on behalf of the American Surety Company of New York, plaintiff, having been first duly sworn, testified by deposition as follows, the same appearing below in the question and answer form:

Direct examination.

By Mr. Rowe:

Q. What is your name?
A. Edward J. Hartenfeld.
Q. Where do you live?
A. 1522 Jonquil Terrace, Chicago, Illinois.
Q. What was your business in 1918, down during the close of the year?

A. Bag dealer, manufacturing burlaps and bags.

Q. Were you during that time connected with any concern in Chicago?

A. Yes, with the Hartenfeld Bag Company as president and treasurer.

Q. Where was its place of business?

A. 312-316 North Carpenter Street.

Q. Did you personally have an office in the Kimball Building?

A. Yes, 301 Kimball Building.

Q. What was the business of the Hartenfeld Bag Co.?

A. Dealing in and handling bags, manufacturing them, reclaiming them and selling them, dealers and manufacturers of bags and burlaps.

Q. During 1918 did the Hartenfeld Bag Co. have any
93 business relations with the American Mills Company of Atlanta, Georgia?

A. Yes, sir.

Q. What was the general nature of those relations?

A. Buying and selling bags; mostly selling.

Q. What do you mean by that?

A. I mean we sold them in more cases than we bought them; we seldom bought.

Q. When you use the word "we" what do you refer to?

A. The corporation.

Q. Were those dealings small or extensive?

A. They were rather extensive.

Q. Do you know who the officers of the American Mills Company were during the latter part of the year 1918?

A. I believe the president was Mr. Amand May, and the treasurer Mr. Leo Strauss, and the vice-president Mr. Miller.

Q. What was the general method of the sales between the corporation and the American Mills Company?

A. The general method of sales was that in shipping goods for the American Mills Company we shipped in their name, and on the bills of lading we had their name completely, in other words, the bill of lading would show that the goods were shipped from the American Mills Company at Chicago and by the American Mills Company, that is, as consignors, and to the American Mills Company, wherever their destination might be.

Q. What was the general method of payment for these goods?

A. It varied, but usually sight draft against bill of lading,
94 notes, and sometimes advance payment.

Q. What was the general magnitude of this business during 1918, can you give us any idea, any figure?

A. I have no idea; I don't remember.

Q. In any case where drafts were attached, or sight drafts were attached to bills of lading for goods sold by the Hartenfeld Bag Co. to the American Mills Company, did the American Mills Company make any claim subsequent to the delivery of the goods either for shortage or as to the quality?

A. On certain occasions.

Q. Were those claims numerous?

A. Quite a few claims. It all depends upon what you would call numerous, and it depends upon the nature of the transactions and the number of shipments made.

Q. What was the general condition of the account between the Hartenfeld Bag Co. and the American Mills Company about August 29, 1918?

A. The general condition of the account was that we were indebted to them for about $22,000.00, something like that.

Q. About August 29, 1918, did you sell them any goods?

A. I don't exactly recall the dates. I would have to have something to refresh my memory. I cannot give you any specific dates.

Q. We will see if we cannot refresh your recollection. I show you what purports to be a copy of a letter from the American Mills Company to the Commercial Credit Company of Baltimore, dated November 29, 1918, and ask you to look at that and see if that
95 does not refresh your recollection as to whether there was a sale of merchandise about August 29, 1918, from the Hartenfeld Bag Co. to the American Mills Company? Does that refresh your recollection as to there being any sale about the 29th of August, 1918?

A. I am reading this letter, Mr. Rowe.

Q. I see.

A. Yes. Of course, this letter does not designate the date, but I remember the transaction very clearly, 50,000 bags and 10,000 pounds of burlap.

Q. That is to say, 50,000 bags and 10,000 pounds of burlap was sold by your company about August 29, 1918, to the American Mills Company of Atlanta, Georgia?

A. Yes, sir.

Q. Do you remember what the price was?

A. No, I don't remember the price.

Q. Look at this letter again?

A. This don't give the price.

Q. Yes, if you will read that again I think you will see the price is $9,225.00?

A. That is a question of mathematics, you will have to figure that out.

Q. All right, figure it out.

A. According to mathematics, 10,000 pounds of burlap at 23½ cents a pound and 50,000 bags at 13¾ cents——

Q. What does that all amount to?

A. $9,225.00.

Q. Do you remember on what terms they were sold at?

A. I don't remember.

Q. Do you recall whether that merchandise was shipped by the Hartenfeld Bag Co.?

A. Yes, the goods were shipped by us.

96 Q. Do you recall when?

A. About that period; around August or the early part of September.

Q. And to whom were they consigned?

A. It usually was the American Mills Company, I believe, if it went direct to Atlanta, in this particular case we may have shipped it to the Hartenfeld Bag Co. because it went direct to Atlanta. The bill of lading would show that.

Q. Did you keep the bill of lading?

A. No, sir.

Q. About September 14, Mr. Hartenfeld, did you see Mr. Lovett and Mr. Strauss in Chicago?

A. They were in Chicago.

Q. About that date?

A. Yes, sir.

Q. Did they call and see you?

A. Yes, sir.

Q. And what took place at that time, if you know, to the best of your present recollection?

A. They came up there with the intention of having—they came up here to have the account——

Q. What did they say to you?

A. They wanted to straighten up the account. That is what they told me they came here for.

Q. What next took place, Mr. Hartenfeld?

A. We went through an accounting.

Q. State the fact.

A. The facts were that they went through an accounting with me.

Q. Go ahead and tell us what took place?

A. As stated previously, they requested to have an accounting, an accounting was had, and this actually took place, these are the facts. We went through various invoices and different mat-
97 ters, the facts of the matter were we had to have an accounting and go through it in order to have such a thing correct. That is actually what took place.

Q. After you had gone through the account what happened then?

A. After we got through the account we went downtown and bought a couple of hats.

Q. Where did this take place?

A. 312-316 North Carpenter Street.

Q. On that date did you give the American Mills Company any notes of the Hartenfeld Bag Co.?

A. On that date we gave notes to the American Mills Co.

Q. And did the American Mills Company on that date give any notes to you?

A. Yes, sir.

Q. Do you remember the amounts and dates of the notes that the American Mills Company gave the Hartenfeld Bag Co.?

A. I don't remember exactly, I think about $9,225.00.

Q. I show you, Mr. Hartenfeld, what purports to be a letter dated September 23, 1918, and written by the American Mills Company to the Hartenfeld Bag Co., and particularly to two invoices which are attached thereto, and ask you to look at these invoices a moment and refresh your recollection, if you can, from them, and then testify as to the dates and amounts of the notes if you are able to do so.

A. What do you want to know?

Q. I want to know, after you have refreshed your recollection, the dates and amounts of the notes of the American Mills Company.

A. Date of the notes, September 14, amount $4,485.08 and $4,650.00.

Q. Now, Mr. Hartenfeld, those two notes together, $4,485.08 and $4,650.00, what do they amount to?

A. $9,135.08.

Q. Were those two notes aggregating $9,135.08 given to you in payment of any particular transaction?

Mr. Moses: Answer that yes or no?

A. Yes.

By Mr. Rowe:

Q. Then I will ask you the question, what were the notes given for?

A. The notes were given for merchandise to be shipped in the future.

Q. Was it the merchandise which was covered by the bill of $9,135.00, August 29, 1918?

A. I believe so.

Q. After you got those two notes, aggregating $9,135.08, what did you do with them?

A. I believe that those notes were put in our safe, and I think that Mr. Simon discounted them at the bank; I had them endorsed and he discounted them.

Q. Don't you know as a fact that they were discounted at Foreman Bros. Banking Co?

A. Yes, sir.

Q. The answer is yes?

A. Yes.

Q. Do you recall when it was?

A. About September 16th. I suppose you are not allowed to state it is what you think, you have to recite it as an absolute fact.

By Mr. Rowe:

Q. You have to give it to the best of your recollection. You know positively that they were discounted at Foreman Bros. Banking Co. September 17, 1918?

A. About that time.

Q. Do you know what was done with the proceeds of that discount?

A. The proceeds were deposited to our credit.

Q. When you say "to our credit" who do you mean?

A. To the credit of the corporation.

Q. Hartenfeld Bag Company?

A. Yes, sir.

Q. Now, about the 27th of September, 1918, did you see Mr. Edmund May in Chicago?

A. Yes, about that time.
Q. Where did you first see Mr. May on that date?
A. At the Kimball Building.
Q. Did you meet him there?
A. To the best of my recollection I believe he called at the office. I believe he called at the office.
Q. What did he say to you?
A. He wanted the account straightened up to date.
Q. When you say straightened up to date, please state what he said.
A. Mr. May stated he wished to have the American Mills Company's account paid in full.
Q. He told you that at the Kimball Building, did he?
A. Yes, sir.
Q. Did you notice his appearance on that date, his physi-
100 cal appearance?
A. I do not quite understand what you mean, Mr. Rowe?
Q. Well, I will try to make myself plain without leading the witness any more than I can help. Did Mr. May appear to be calm?
A. I was not very much interested in his appearance, whether he was calm or excited, it was of no material difference to me. He seemed somewhat agitated.
Q. You say he asked you for an immediate payment of the account of the American Mills Company?
A. Yes, sir.
Q. Do you know how much he demanded approximately?
A. Around $22,000.00.
Q. What did you tell him?
A. That we were in no position to pay it.
Q. What did he say then?
A. He insisted upon payment, and wanted to know whether we could not give him some collateral.
Q. What did you say to that?
A. That we could not.
Q. What did he say then?
A. He wanted to know if we could not ship goods out for that amount.
Q. What did you say?
A. That we could not.
Q. Was there anything said about any real estate security?
A. He suggested that I could give real estate as security.
Q. What, if any, answer did you make to him?
A. That is was not practical, that it could not be done.
101 Q. Did he ask for any other method of payment?
A. He requested any payment that was secured.
Q. What did you say to that?
A. I told him that we could not make any payment along the lines that were stated.
Q. Go on.
A. And then we went into the effect of shipping goods in the future to be secured by a bond.

Q. Please state, as near as you can recall, what was said about that?

A. He stated that he did not care how the debt was liquidated provided it could be adjusted in some manner that would be acceptable to their company.

Q. After you suggested the shipping of merchandise in future secured by bond, what did he say to that?

A. We drew up a contract, he stated, we will draw up a contract and he would have it passed upon, whether it could be accepted by them.

Q. Passed upon by whom?

A. An attorney.

Q. His attorney or your attorney?

A. His attorney.

Q. After Mr. May had so far listened to your suggestion that merchandise be shipped at some time in the future in payment of this account for approximately $22,000.00, and delivery of it was to be secured by some bond to the extent that he would have the matter passed upon by his counsel, was a written contract prepared?

A. A written contract was prepared.

Q. Mr. Hartenfeld, who actually wrote out the contract which you have referred to?

102 A. The contract was dictated to Miss Sutton and written out by her.

Q. After it was written out by her what was done with it?

A. It was given to Mr. May.

Q. And what did he say?

A. He said he was going to take it over to his attorney and have it passed upon.

Q. Did he go out?

A. He did.

Q. Did he subsequently return?

A. He did.

Q. And what was done then?

A. A change was made in the contract.

Q. Do you recall what the change was?

A. To the best of my recollection it was that clause that pertained to having received a certain amount of money covering the merchandise in question.

Q. And was that change suggested by Mr. May?

A. Yes, by Mr. May and his attorney.

Q. It was suggested to you by Mr. May?

A. Yes, sir.

Q. You did not see his attorney, did you?

A. No.

Q. Then what was done?

A. It was too late to make that change that particular day, so the change was inserted in the contract the following day and was sent over to the American Surety Company to be passed upon and it was accepted.

Q. Just a moment: you say it was sent over to the American

Surety Company. Are you familiar with the contract as it was finally drawn up?

A. I remember the contract in brief. I remember it substantially.

103 Q. I show you, Mr. Hartenfeld, paragraph 22 of the complaint in the suit pending in the United States District Court in the Southern District of New York. And at the same time I show you also Exhibit A attached to the complaint or petition in the action pending in the Superior Court of Fulton County, Georgia, and ask you to look at these papers and state whether that is a correct copy, those are correct copies, of the contract between the American Mills Company and the Hartenfeld Bag Co., which you have testified was prepared in Chicago about September 27, 1918?

A. Yes, that is an exact duplicate of the contract.

Q. After Mr. May returned with this draft which you say that he carried away with him——

A. This contract.

Q. With this contract which he carried away with him, and suggested certain changes to be made therein, what if anything did he say with reference to your proposal to deliver merchandise at some future date in payment of the indebtedness which he was demanding from the Hartenfeld Bag Co. to the American Mills Company as secured by the surety bond guaranteeing the delivery of the goods?

A. The arrangement was perfectly satisfactory.

Q. What did he say?

A. He stated it would be all right to ship the goods upon that arrangement.

Q. What was the arrangement?

A. Upon the arrangement of the contract as it was secured by this bond.

104 Q. Now, Mr. Hartenfeld, kindly look at the contract which is set forth in the complaint which you have stated is an exact copy of the contract which was executed, and state whether or not that is the final form of the written agreement.

A. That is the final form.

Q. Please state whether or not that is the final form of the written agreement prepared by you and Mr. May with the intention of carrying into effect your proposal that the Hartenfeld Bag Co. should deliver goods to the American Mills Company within 75 days thereafter in payment of its indebtedness of approximately $22,000.00 which Mr. May was demanding, provided that some surety company satisfactory to Mr. May and the American Mills Company could guarantee the delivery of the goods.

A. It is, yes,

Mr. Rowe: I ask that the copy in the New York case which has been shown to the witness be marked for identification American Surety Company's Exhibit 4, of August 12, 1919.

(Document was so marked by the Commissioner.)

Mr. Rowe: And I ask to have the petition or complaint in the Georgia case, which has been shown to the witness, marked for identification American Surety Company's Exhibit 5, of August 12, 1919.

(Document was so marked by the Commissioner.)

105 By Mr. Rowe:

Q. Did the American Surety Company subsequently deliver a bond to you?
A. Yes, sir.
Q. What did you do with it?
A. I gave it to Mr. May.
Q. And I presume Mr. May retained it?
A. To the best of my recollection.
Q. At least he carried it away from your premises, anyhow?
A. Yes, sir.
Q. This contract which you have identified here, American Surety Company's exhibits for identification 4 and 5 of this date recites, Mr. Hartenfeld, "Total amount of this contract is $22,100, paid to Hartenfeld Bag Co. upon the execution of this agreement, the receipt whereof is hereby acknowledged." Did Mr. May pay you any money on this contract on the 27th of September?
A. No, sir.
Q. Did he pay you any money on the 28th of September, that is, the following day?
A. No, sir.
Q. Was it your intention or expectation when this contract of September 27th, 1918, was executed that the American Mills Company should pay the Hartenfeld Bag Co. $22,100 in addition to the debt that Mr. May claimed the Hartenfeld Bag Company owed the American Mills Co.?
A. No.
Q. When did you next see Mr. May, Mr. Hartenfeld?
A. Two days later.
Q. When was that?
A. It was on a Monday, I believe.
106 Q. Where?
A. Kimball Building.
Q. Did he come alone?
A. No, he came with Mr. Haas.
Q. This gentleman sitting here?
A. Yes, sir.
Q. Please state what took place at that interview?
A. He had a check for $22,100.00, a certified check, and he requested that I go to the bank with him.
Q. To whose order was his check made?
A. Hartenfeld Bag Co.
Q. He requested you to go where?
A. To the bank and have this check deposited, and also make our

check for the amount we owed him, covering a statement which he had with him, to have that certified and give him that check in return.

Q. What did you say to that?

A. I agreed to it.

Q. Do you recall what you said?

A. That I would go to the bank with him.

Q. I show you American Surety Company's Exhibit 1 for identification, which purports to be a copy of the check of the American Mills Company to the Hartenfeld Bag Co. for $22,100.00, and endorsed by the Hartenfeld Bag Co., and which bears the stamp of the Foreman Bros. Banking Co., given on October 3, 1918, and ask you whether that, to the best of your recollection, is a copy of the check which Mr. May showed you?

A. It is.

Q. And where did you go with Mr. May?

A. I went with Mr. May and Mr. Haas both to the Foreman Bros. Banking Co.

107 Q. Who took the American Mills Company check, who had it in his possession?

A. I don't remember whether they held it until they got to the bank or whether I held it until I got there.

Q. When you got to the Bank what did you do?

A. Deposited it.

Q. To whose account?

A. To the account of the Hartenfeld Bag Co.

Q. Then what did you do?

A. I immediately gave them the return check to be certified.

Q. I show you original check of which American Surety Company's Exhibit 2 of this date is a photostatic copy, and ask you if that is the original check which you say you gave the American Mills Company on that date?

A. It is.

Q. And that is signed by you?

A. Yes, sir.

Q. To whom did you deliver it?

A. Mr. May.

Q. Was it certified?

A. It was certified before I gave it to him.

Q. Who certified it, do you know?

A. Harold E. Foreman.

Q. Did you see him that day?

A. Yes, sir.

Q. Did you speak to him about this transaction?

A. I spoke to him about the transaction I don't remember whether I told him the details. It was not necessary.

Q. Did they tell you why, did Mr. May and Mr. Haas tell you why they wanted you to do this, deliver one check and receive another check? What, if anything, did Mr. May and Mr.

108 Haas state to you as the reason for this?

A. To the best of my recollection the statement was made that that would make the contract more legal.

Q. That is your best recollection at the present time?
A. Yes, sir.
Q. Prior to this date, which seems to have been the 3rd of October, 1918, when Mr. May was in Chicago at the time of the execution of this contract and delivery of the bond, September 27 and September 28, 1918, was anything said about any payment of any check to you?
A. No, sir.
Q. When did you first hear of any payment of $22,100.00 to you?
A. When Mr. May came to Chicago on Monday.
Q. When he came to Chicago after he went home with the bond?
A. Yes, sir.
Q. Approximately how much was your balance at Foreman Bros. Banking Co. on the morning of October 3, 1918?
A. I have no idea.
Q. Your answer is, you have no idea?
A. I know it was not very much at that particular time.
Q. Under $2,000.00?
A. Possibly.

The hour of 4:30 o'clock P. M. having arrived the further taking of depositions was by the Commissioner continued until the following day, August 13, 1919, at 9:30 o'clock A. M.

109 August 13, 1919, 9:30 a. m.

Parties met pursuant to adjournment.

Present: The Commissioner and Counsel for respective parties, the same as before.

EDWARD J. HARTENFELD resumed the stand for further

Direct examination.

By Mr. Rowe:

Q. You testified yesterday that when Mr. May was here on October 3rd with Mr. Haas, Mr. May gave you at the time this check for $21,087.20?
A. Mr. May gave me a check for $22,100.
Q. And you gave him a check for $21,087.20?
A. Yes, sir.
Q. And that Mr. May gave you a receipt which he had prepared?
A. Yes, sir.
Q. I show you what purports to be a photostatic copy of receipt upon which is endorsed on the bottom, "Paid $21,087.20 10/3/18, A. May, Prest.," and ask you if you ever saw the original of that?
A. Yes.
Q. Was the original of that the receipt which Mr. May gave you on October 3, concerning which you testified?
A. Yes.

110 Mr. Rowe: I ask to have that photostatic copy marked for identification American Surety Company's Exhibit 6 for identification.

(Said document was thereupon by the Commissioner marked for identification American Surety Company's Exhibit 6, of August 13, 1919.

By Mr. Rowe:

Q. Please look at American Surety Company's Exhibit 6 for identification, Mr. Hartenfeld, and state whether the original of which that is a copy was delivered to you by Mr. May on October 3, 1918?

A. Yes.

Q. Do you know what has become of it?

A. The last I knew of it, it was in our files.

Q. Where?

A. Hartenfeld Bag Co., 312 North Carpenter Street, and later removed to the Central Trust Company.

Q. And that is the last you knew about it?

A. Yes.

Q. That handwriting which appears upon the photostatic copy, do you know who did that handwriting, was it done in your presence on the original?

A. Yes, Mr. May wrote that.

Q. In your presence?

A. Yes.

Q. Now, Mr. Hartenfeld, I would like to have you look at American Surety Company's Exhibit 3 for identification. I will show you the carbon of which Exhibit 3 for identification is a copy, and
111 ask you to look at that, have you any recollection in connection with this telegram?

A. Yes.

Q. What is it?

A. I recall that telegram; Mr. May wired or had us wire his company in Atlanta.

Q. Who dictated the telegram?

A. Mr. May.

Q. In your presence?

A. Yes, sir.

Q. At your office in the Kimball Building?

A. Yes, sir.

Q. Who did he dictate it to, if you know?

A. Miss Sutton, I believe.

Mr. Rowe: That is all.

Cross-examination.

By Mr. Moses:

Q. Mr. Hartenfeld, how long previous to August 29, 1918, were you president and treasurer of the Hartenfeld Bag Company?

A. About two years.
Q. And when, with reference to that when you say two years previous, was the Hartenfeld Bag Company created or organized?
A. The Hartenfeld Bag Company was created about seven or eight years ago.
Q. And who was president and treasurer of the Hartenfeld Bag Company previous to your administration?
A. I don't even know.
Q. Where did the Hartenfeld Bay Co. get its name of Hartenfeld Bag Co.?
A. From my father.
Q. Was your father connected with that business previous to your being connected with it?
A. Yes, many years previous.
112 Q. Who were the officers of the Hartenfeld Bag Co. August 29, 1918?
A. My father and mother.
Q. And what position did your father occupy?
A. I believe he was secretary.
Q. And your mother?
A. She held no office, she was one of the directors.
Q. There were three directors?
A. Yes, sir.
Q. Consisting of yourself, your father and mother?
A. Yes, sir.
Q. You have testified that on August 29, 1918, you sold to the American Mills Company for the Hartenfeld Bag Co. 50,000 bags and 10,000 pounds of burlap at an aggregate invoice price of $9,225.00, is that right?
A. Yes, sir.
Q. Do you know upon what terms that sale was made?
A. We received notes in payment of same.
Q. At the time that the contract was made?
A. Yes, sir.
Q. So that simultaneously with the purchase of that property last mentioned, notes of the American Mills Company were delivered to the Hartenfeld Bag Co., is that right?
A. Yes, sir.
Q. Do you remember what the aggregate amount of those notes were?
A. The aggregate? Do you mean the total?
Q. Yes.
A. For that particular purchase?
Q. Yes.
A. $9,225.00.
Q. Are you sure about that?
A. Yes. Let me see the invoice of August 29.
113 Q. That is what we are talking about.
A. Well, I do not remember what the aggregate amount of the notes was.
Q. Isn't it a fact that you testified on yesterday that one of the notes was for $4,485.08 and the other $4,650.00?

A. It is a fact, but I don't remember exactly the amount of the notes tendered at that particular time by the American Mills Company.

Q. When you use the expression "tendered" you mean paid, don't you?

A. Paid or given us.

Q. Who were those notes delivered to, when I say to, I mean who represented the Hartenfeld Bag Co.?

A. They were delivered to me.

Q. By whom?

A. Mr. Strauss.

Q. Mr. Strauss, being Leo Strauss, treasurer of the American Mills Company?

A. Yes, sir.

Q. Where was Mr. Strauss at the time he delivered those notes?

A. At our office.

Q. 312 North Carpenter Street?

A. Yes, sir.

Q. Who else was there?

A. Mr. Lovitt.

Q. Who is Mr. Lovitt?

A. A representative of the American Mills Company.

Q. Is it not true that the notes testified to by you were not delivered to the Hartenfeld Bag Co. on August 29, 1918?

A. I cannot remember exactly the date, but the notes in question were delivered to me by Mr. Strauss when he was in Chicago.

Q. Is it not a fact that 50,000 bags and the 10,000 pounds of burlap which were sold by the Hartenfeld Bag Co. to the
114 American Mills Company were sold upon a credit of 90 days' payment?

A. I don't remember that.

Q. You may be mistaken then when you say the notes were delivered to you by Mr. Strauss on August 29, 1918?

A. I am not mistaken as to the delivery of the notes at all.

Q. I am asking you if you may not be mistaken that those notes were delivered to you by Mr. Strauss representing the American Mills Company, August 29, 1918?

A. I could not have the notes unless they were delivered.

Q. Is that your best answer?

A. Yes, sir.

Q. On August 29, 1918, did the Hartenfeld Bag Co. have assets in excess of its liabilities?

A. I believe so.

Q. How much in excess of its liabilities?

A. I don't know.

Q. Approximately how much in excess of its liabilities?

A. I don't remember.

Q. Have you absolutely no recollection of it?

A. I have no recollection of it.

Q. Who was the man who had charge of the finances of the Hartenfeld Bag Co. on August 29, 1918?

A. From a figurative standpoint, I did, but I was not there much, I didn't have very active interest in the Hartenfeld Bag Co. for several months, I was engaged in other occupations.

Q. Who did have active interest in the Hartenfeld Bag Co.?

A. Anybody in the office.

Q. Who was anybody in the office, Miss Sutton?

A. Miss Sutton, perhaps.

Q. You say Miss Sutton perhaps, did Miss Sutton run the
115 business of the Hartenfeld Bag Co. on or about August 29, 1918?

A. Running the business and paying bills, something of that kind, are two different things.

Q. Who entered into contracts for the Hartenfeld Bag Co. August 29, 1918, for the purchase and sale of merchandise?

A. Myself or Mr. Simon.

Q. Who is Mr. Simon?

A. Who is Mr. Simon?

Q. Yes?

A. A former employee of the Hartenfeld Bag Co.

Q. Did he have any official position?

A. No.

Q. Did he have any financial interest in the Hartenfeld Bag Co.?

A. None.

Q. He is the same man who filed a petition in bankruptcy against the Hartenfeld Bag Co.?

A. Not at all.

Q. There was a Mr. Simon filed a petition?

A. I understand he was an office boy or clerk in a Lawyer's office, an office boy.

Q. What was the condition of the Hartenfeld Bag Co. on September 1, 1918, did it have greater assets than its liabilities?

A. I don't know anything about it.

Q. Did you at any time know anything about it?

A. I did.

Q. Did you ever know whether on September 1, 1918, whether the Hartenfeld Bag Co. had greater or less assets than liabilities?

A. I don't know, because I didn't take the inventory or go through the account.

116 Q. Who did take the inventory or go through the accounts?

A. It was done by a foreman, they used to have a man by the name of Brunswick there to go through our account.

Q. Who was the foreman?

A. A man by the name of Seuer.

Q. Did he appraise the value of the merchandise when he took inventory?

A. No, Mr. Simon took inventory.

Q. Did you?

A. Very seldom.

Q. Did you on or about September 1, 1918?

A. So far as I remember, no.

Q. Have you any recollection one way or the other?

A. So far as I remember, no. That is my recollection.

Q. Would you say on September 1, 1918, the assets of the Hartenfeld Bag Co. were less than the liabilities of the Hartenfeld Bag Co.?
A. The assets?
Q. Yes.
A. You mean anything about the financial——
Q. Did you at any time know anything about that?
A. I stated I did.
Q. Did you at any time know whether on September 1, 1918, the assets were more or less than the liabilities?
A. I don't know, no.
Q. Did you between August 29, 1918, at any time and prior to and including October 3, 1918, know whether the assets of the Hartenfeld Bag Co. were more or less than the liabilities of the Hartenfeld Bag Co.?
A. Personally, no.
Q. Did you between those dates or on those dates have any opinion on the subject?
117 A. Have any opinion on that subject? I had no opinion.
Q. When was it that Mr. Strauss called upon you representing the American Mills Co. in the fall of 1918?
A. Was it the fall?
Q. I am asking you when he called upon you in the fall of 1918?
A. If it was in August it was not in the fall.
Q. Was it in August?
A. I believe so.
Q. Do you know whether it was in August?
A. Yes, I believe it was in August.
Q. On what date?
A. About the latter part of August.
Q. About what date?
A. 27th, 28th, 29th, 30th or 31st.
Q. Is it not true that Mr. Strauss did not call upon you in the latter part of August, 1918?
A. Is it not true?
Q. Yes, that he did not call on you?
A. So far as I can remember he did call.
Q. Isn't it a fact he called on you about September 14, 1918?
A. Possibly.
Q. You would not say it was not so, would you?
A. I think it was the latter part of August to the best of my recollection, it may have been in September.
Q. Now, you have testified that the two notes, one for $4,485.08, and the other for $4,650.00, given in payment of the invoice of August 29, 1918, was delivered to you on August 29, 1918, is that right?
A. To the best of my recollection.
Q. And after that were the notes credited to the account of the American Mills Company on the books of the Hartenfeld
118 Bag Co.?
A. Yes, they were credited so far as I know.
Q. Who kept the books?
A. Anybody in the office there.

Q. Didn't you have a bookkeeper?
A. No, sir.
Q. Did you keep them?
A. No.
Q. Did you have anything to do with keeping them?
A. No.
Q. Did you never look at them?
A. I probably did not look at the books for five or six months or longer.
Q. After the two notes, the $4,485.08 note and the $4,650.00 note had been delivered to the Hartenfeld Bag Co. by the American Mills Co., the invoice representing the purchase of 50,000 bags and 10,000 pounds of burlap, purchased by the American Mills Company from the Hartenfeld Bag Company on August 29, 1918, was thereby paid, is that right?
A. That invoice was paid, it was an advance of money. We owed them $9,225 until the goods were billed and delivered.
Q. When with reference to August 29, 1918 were the 50,000 bags and the 10,000 pounds of burlap delivered or rather shipped by the Hartenfeld Bag Co. to the American Mills Co.?
A. I don't remember.
Q. Were they shipped?
A. I don't know the circumstances.
Q. Do you know whether they ever were shipped?
A. I believe they were shipped.
Q. You know a concern known as the Commercial Credit Company?
A. Yes, sir.
119 Q. Did the Hartenfeld Bag Company ever have any dealings with the Commercial Credit Company?
A. Yes, sir.
Q. Those dealings were the sale, were they not, of open accounts owing to the Hartenfeld Bag Company?
A. Yes, sir.
Q. After the notes of $4,485.08 and $4,650.00 had been paid to the Hartenfeld Bag Company by the American Mills Company against the invoice of August 29, 1918, the Hartenfeld Bag Company sold to the Commercial Credit Company, did it not, the invoice of August 29, 1918 held by the Hartenfeld Bag Company against the American Mills Co?
A. Personally, I had nothing to do with the transaction.
Q. I am not asking you if you had personally anything to do with the transaction. I am asking you if it is not a fact that the Hartenfeld Bag Co. sold their open accounts to the Commercial Credit Company?
A. I don't know whether it is a fact, I would have to explain the circumstances to you to see if it is a fact.
Q. Did the Hartenfeld Bag Co. after August 29, 1918, assign to the Commercial Credit Company a claim of the Hartenfeld Bag Co. against the American Mills Company for $9,225.00 representing merchandise sold by the Hartenfeld Bag Co. to the American Mills Company on August 29, 1918?

A. I don't remember.

Q. Who had the dealings on behalf of the Hartenfeld Bag Co. with the Commercial Credit Company?

A. I will explain that.

120 Q. I am asking you who had the dealings, did you or did Mr. Simon?

A. Mr. Simon handled it.

Q. And who signed the assignment?

A. I signed them in blank.

Q. You signed blank forms of assignment and left them with Mr. Simon, is that right?

A. Yes, sir.

Q. Did you ever see these blank forms of assignment after they were filled in?

A. Very seldom.

Q. Have you ascertained since August 29, 1918, that in fact the Hartenfeld Bag Co. did assign to the Commercial Credit Company the invoice of August 29, 1918, amounting to $9,225.00 against the American Mills Company?

A. Yes, I believe they did.

Q. When with reference to the date of August 29, 1918, did you first ascertain that fact?

A. I don't remember.

Q. Have you no recollection on that subject?

A. No.

Q. Is it not true that you ascertained that fact previous to September 27, 1918?

A. I don't remember.

Q. I have asked you whether you did not ascertain that fact previous to or on September 27, 1918?

A. I answered I don't remember.

Q. Would you say now that you did not ascertain that fact previous to September 27, 1918?

A. I answered I did not remember, therefore, I cannot say anything about it affirmatively or negatively.

121 Q. What is your present recollection as to when you first did ascertain that fact?

A. I don't remember it now.

Q. What don't you remember now?

A. Exactly the time when I ascertained that fact.

Q. Did you ascertain it before or after the Hartenfeld Bag Company went into bankruptcy?

A. I believe it was some time before.

Q. Is it not a fact that Mr. May called upon you here in Chicago on or about September 27, 1918, with reference to the assignment by the Hartenfeld Bag Co. of a claim against the American Mills Company represented by the invoice of August 29, 1918, amounting to $9,225.00?

A. Mr. May called, but I do not recall the exact date; if you had mentioned that I could have been in a position to remember that more clearly.

Q. When was the last time you saw Mr. May?
A. The last part of September.
Q. That is the last time?
A. Or the early part of October.
Q. You did see him the latter part of September?
A. Yes, sir.
Q. You saw him September 27th?
A. I believe so.
Q. In the Kimball Building?
A. Yes, sir.
Q. You say you believe so?
A. Yes, sir.
Q. Don't you know it?
A. I don't remember whether it was the 26th, 25th, 24th, 28th, or 29th, or 27th.
Q. Haven't you testified that he called on you September 27, 1918, in the Kimball Building?
122 A. It was after I saw those things here (referring to papers).
Q. Yet you testified it was September 27, 1918?
A. I think I so testified.
Q. Don't you know whether you so testified?
A. I certainly testified to that yesterday, that it was September 27, 1918.
Q. Don't you now recall it was on September 27, 1918, that Mr. May called upon you with reference to the assignment by the Hartenfeld Bag Co. to the Commercial Credit Company of a claim against the American Mills Company for $9,225.00 represented by the invoice of August 29, 1918?
A. Yes, with a balance of the account we owed him, everything.
Q. When previous to September 27, 1918, did you ascertain that your account had been assigned to the Commercial Credit Company?
A. I don't remember it.
Q. Have you tried to remember?
A. Yes, sir.
Q. When?
A. I am trying to remember now.
Q. Have you any recollection now that Mr. May's statement to you that that assignment had taken place came to you as a surprise on September 27, 1918?
A. I don't remember that.
Q. It didn't make very much of an impression on you at that time?
A. I don't remember whether it did or not.
Q. Did you express to Mr. May at that time any regrets that that assignment had taken place?
A. I don't remember my expressions to Mr. May or his to me.
123 Q. Do you remember stating to Mr. May at that time that you regretted that the assignment had taken place, that it

had not been done by you but that it had been done by Mr. Simon.

A. I believe in substance that is what I told him.

Q. Now, you do recall that?

A. After you have suggested the fact to me.

Q. It comes back to your memory.

A. In a way, substantially.

Q. What do you mean by that?

A. Just the same as anybody else could tell you in a way, in substance.

Q. You mean that conversation did take place?

A. I believe that conversation substantially took place.

Q. What notes did the Hartenfeld Bag Co. issue to the American Mills Company, if any, on or about September 14, 1918?

A. At the time Mr. Strauss came here, whether it was August 29 or September 14, 1918, I don't remember which, he had a sort of an accounting here and he wanted me to issue to him a certain number of notes, and they were issued. That is about all I remember of it.

Q. That is all you remember; and what were those notes issued for?

A. In the balance of an accounting that he had against us apparently.

Q. Were those notes given in full payment of the account owing by the Hartenfeld Bag Co. to the American Mills Company?

A. So far as I know.

124 Q. Reflect about that.

A. I tried to reflect about it I say so far as I know, I did not keep the books.

Q. If the Hartenfeld Bag Co. gave notes on or about September 14, 1918, in liquidation of the account, you mean the account owing by the Hartenfeld Bag Co. to the American Mills Company?

A. It must have been of that company or we would not have given notes.

Q. You have no recollection at this time how much those notes were?

A. Oh, yes, they were around $9,000.00.

Q. The notes were for $9,035.08, were they not?

A. They must have been; I don't remember exactly the dollars and cents.

Q. Have you no means by which to refresh your recollection?

A. The statement of accounting would show that this was so much.

Q. What are you looking at now?

A. Statement of account.

Mr. Rowe: Let the record show that the witness is looking at American Surety Company's Exhibit 6 for identification.

By Mr. Moses:

Q. Now, what is your answer as to the amount of the notes given?

A. $9,035.08.

Q. On September 27, 1918, you have testified that Mr. May came to the Kimball Building to the office of what company?

A. St. Clair Mining & Milling Company.
Q. What was your connection with that company?
A. I was the president.
Q. He came there, didn't he?
A. Yes, so far as I remember.
Q. Why do you add to your statement now so far as you remember?
A. Because it is a year ago. I may have dropped in at his hotel, he may have picked me up at Carpenter Street, it is unusual for a man to remember those things.
Q. It may be you picked him up at his hotel?
A. Yes, sir.
Q. Have you spoken to anybody since the conclusion of your direct examination with reference to your testimony of yesterday?
A. No, sir.
Q. How is the amount of the aggregate of those two notes, $9,225.08 or $9,035.08 arrived at?
A. I don't remember how that was arrived at.
Q. The invoice for which those notes were given was the invoice of August 29, 1918, for $9,225.00, is that not so?
A. So far as I can remember, yes.
Q. Now, having made that statement, how was the amount of $9,135.08 arrived at?
A. I really cannot recall that.
Q. When Mr. May called upon you in the Kimball Building on September 27, 1918, who was present?
A. Do you mean when he called on me at the first call, the first call he made there.

Mr. Mosse: Repeat the question.

(Question read.)

A. Can't I ask whether it was the first call, because he called on me several times during that day?

Mr. Mosse: Answer the question.

A. Which call?
Q. How many times did Mr. May call on you on September 27th?
A. Several times, at least three, possibly three, four or five, to and out.
Q. He might have been there a dozen times that day?
A. No, not a dozen times.
Q. You have a distinct recollection it was more than once?
A. Yes, sir.
Q. What time did he come in the first —?
A. Some time in the morning.
Q. What time?
A. Possibly nine o'clock.
Q. Who was present when he came in?
A. Several people from the Mining Company were present at that time.
Q. Who?

A. Miss Kistner was there, and a man by the name of Rosenblum.
Q. Anybody else?
A. That is all I can remember.
Q. Miss Sutton was there, too?
A. She was not there at the first call.
Q. When did she first meet Mr. May on that day?
A. She met Mr. May at the LaSalle Hotel.
Q. When?
A. About noon, somewhere around there.
Q. About noon?
A. Yes, sir.
Q. He had been to the Kimball building on that day previously to her meeting him at noon that day, is that right?
A. I believe so.
Q. So that at the first time he came into your office on September 27, 1918, Miss Sutton was not there?
A. Not so far as I can remember.
127 Q. You had a conversation with Mr. May the first time that he came in, who was present and heard that conversation?
A. No one was present.
Q. You and he were alone?
A. Yes, sir.
Q. What did he say?
A. He wanted the account settled up in full.
Q. Was that the first statement he made?
A. Practically; I guess he said good morning, if he did not forget it, I don't remember.
Q. What did you say?
A. It could not be done.
Q. What, if anything, was said with reference to the discounting of the $9,225.00 claim or the sale of the $9,225.00 claim to the Commercial Credit Company?
A. That was all forgotten in the anxiety to have the entire claim settled up.
Q. I asked you if anything was said about the sale of the $9,225.00 account to the Commercial Credit Co.?
A. I presume something was said.
Q. That amount had not been paid at that time, the $9,225.00?
A. The account of the Commercial Credit Company?
Q. Yes.
A. I don't know.
Q. Or had it been paid off to the Hartenfeld Bag Co.?
A. I believe so.
Q. By the issuance of those notes?
A. I believe so.
Q. What, if anything, was said on the date in question, or between the date of September 27th and October 3, 1918, with reference to the account which had been assigned to the Commercial Credit Company?
128 A. I don't remember exactly.
Q. Was anything said?

A. Yes.
Q. You have absolutely no recollection what was said?
A. Exactly what was said, no, I have not.
Q. Have you a recollection of the subject matter of the conversation with reference to that account which had been assigned?
A. No, I have no distinct recollection.
Q. He said he wanted the account paid, didn't he?
A. The whole account.
Q. And you said it cannot be done, is that right?
A. Yes, sir.
Q. What else did he ask you about the account, did he ask you for collateral?
A. Yes, sir.
Q. Did he ask you for real estate security?
A. Yes, sir.
Q. And what did you say when he asked for collateral?
A. That I could not give it to him.
Q. What did you say when he saked for real estate security?
A. That we could not give it to him.
Q. And then what was said?
A. Then the plan was hit upon to give him a surety bond.
Q. Surety bond for what?
A. To secure the delivery of merchandise aggregating the amount of the debt.
Q. And who suggested that plan which you say was hit
129 upon?
A. I possibly suggested it.
Q. You suggested it?
A. Possibly.
Q. Would you say that Mr. May suggested it?
A. I would not say. I know he accepted it if I did suggest it.
Q. You would not say he suggested it?
A. He suggested anything that would secure the delivery of the merchandise.
Q. He suggested that he wanted the account paid?
A. Yes, or anything that would secure a delivery of the merchandise.
Q. And then you said we will deliver you some merchandise in payment of the account, is that right?
A. We will deliver you some merchandise.
Q. In payment of the account, or words to that effect, is that right?
A. Yes, for future delivery.
Q. And then you told Miss Sutton to come in?
A. Yes.
Q. And you dictated a contract to her?
A. Yes.
Q. And then she typewrote it?
A. She had it typewritten, yes
Q. She had it typewritten, didn't she typewrite it?
A. She had it typewritten, she could do it herself.

Q. Did she do it herself?
A. Yes, sir.
Q. How many copies of that contract were made?
A. I don't know.
Q. Were there two or three dozen of them made?
A. I don't remember. It would be very unusual to have two or three dozen made.
130 Q. I am trying to get at how many were made.
A. I think Miss Sutton would be the best person to testify to that.
Q. Have you any recollection on it?
A. No, sir.
Q. A copy was made?
A. Yes, sir.
Q. What became of that copy?
A. What copy?
Q. Of the contract which you say you dictated to Miss Sutton
A. Who has the copy and who has the original?
Q. You say you don't know how many copies were made, I asked you if one copy was made and you said yes, and I asked you what became of the copy that was made by Miss Sutton, was it delivered to Mr. May?
A. Mr. May received a copy or the original of the contract.
Q. Now, you say there was a copy made, is that right?
A. I suppose there was.
Q. You suppose it?
A. Yes.
Q. Then what did Mr. May say?
A. Mr. May said if the surety company would stand behind it, and if it was legal and would be passed upon by a competent attorney that he would accept a surety bond, but he was very skeptical about an insurance company taking it.
Q. What did you say to him when he said he was skeptical about an insurance company taking it?
A. That was of no consequence.
Q. Did you say anything to him about it?
A. I told him to have it passed upon by his attorney.
131 Q. Did you say anything to him about his statement that he was skeptical about an insurance company signing it?
A. I don't remember what I said.
Q. Then what did he say?
A. Then he naturally went out to see an attorney.
Q. He came back afterwards?
A. Yes, sir.
Q. Did he bring back that paper with him?
A. Yes, sir. Changed.
Q. On its face?
A. Yes, I believe so.
Q. Did you read it over as changed?
A. I know there was a change in it.
Q. Did you read that over as changed?

A. Yes, sir.
Q. Then what was done with it?
A. Then the following day——
Q. What was done with the contract as changed, what was done with that paper?
A. It was retained by Mr. May until the following day.
Q. Then what?
A. Then the following day the bonding company was informed.
Q. Before we get to the bonding company, was the instrument with the changes then copied?
A. Sir?
Q. Was the instrument with the changes then copied?
A. What instrument?
Q. What?
A. What instrument are you speaking about? What is an instrument?
Q. Do you know what the word instrument means?
A. It may mean several things, it may mean a tool.
132 Q. Don't you know a contract is called an instrument?
A. It is a very poor word for a contract.
Q. You never heard that before?
A. No, a contract is a contract; but I am not a lawyer.
Q. Was the contract with the changes on it copied?
A. I believe so.
Q. By whom?
A. It was copied by Miss Sutton.
Q. Miss Sutton was your girl, in your office working for you?
A. I don't know what you mean by my girl.
Q. She was working for you?
A. Yes, sir.
Q. You are somewhat facetious about your answers?
A. I don't mean to be.
Q. You are. And I want the record to show it.
A. I am very sorry, but I cannot help it.
Q. You think this lawsuit is a joke, don't you?
A. I don't think anything of the kind. It is a lawsuit, yes.
Q. And your sympathy in the lawsuit is with the American Surety Company?
A. No, sir.
Q. You are wholly indifferent about the lawsuit?
A. Yes, sir.
Q. You don't care who wins?
A. I don't care who wins. I am just testifying what is right.
Q. You don't care who wins?
A. It is of no consequence to me. That is, what you are having, a lawsuit.
Q. After that instrument was copied by Miss Sutton what became of it?
A. Let me see.
133 Q. You are considering a long time.
A. I will consider it as long as I want to, I have been

polite to you and asked you in a gentlemanly manner if I did not understand the question, and I certainly request every time I do not understand a question that I will have it repeated to me.

Mr. Moses: Take all this down.
The Witness: Yes, please take it down,
Mr. Moses: Take every bit of that down.
The Witness: Yes, take every bit of it down.
Mr. Moses: Now, read the last question.

(The last question was read).

A. It was forwarded to the American Surety Company.
Q. How many copies were made by Miss Sutton of that completed document?
A. I don't remember.
Q. You have no recollection of it?
A. No, sir.
Q. Was there one copy made?
A. I don't remember.
Q. You don't even know whether there was one copy made?
A. I do not.
Q. Do you know whether there was not one original made?
A. I do not.
134 Q. Do you know whether a copy was made for your company and a copy made for the American Mills Company?
A. It would have been usual.
Q. But you don't know?
A. I myself don't remember.
Q. Isn't it a fact that there were three copies made?
A. There may have been.
Q. You don't know, do you?
A. I don't remember.
Q. You have no recollection on the subject?
A. I don't remember whether I signed one or three, or thirty.
Q. There might have been thirty signed?
A. No, I don't think so.
Q. You just said there might have been thirty.
A. That is what I stated, but I don't think so.
Q. The American Surety Company got a copy, didn't it?
A. I suppose so.
Q. Do you know whether it did?
A. I imagine they would want a copy in order to transcribe it into their contract.
Q. Do you know whether the American Surety Company received a copy of that contract?
A. A copy or the original was sent over to the American Surety Company, they evidently received it.
Q. It was sent over?
A. Yes.
Q. How?
A. I believe Mr. Burns brought it over.
Q. Brought it over to you?

A. To the Surety Company, or may be one of our people took it over there, I don't remember.

135 Q. To whom was it delivered?

A. To whom?

Q. By the Hartenfeld Bag Co. for the American Surety Company.

A. By the Hartenfeld Bag Co. for the American Surety Company, I don't know.

Q. Who represented the Hartenfeld Bag Co. in the delivery of that contract to the American Surety Company?

A. I don't know whether anybody represented them.

Q. Didn't you deliver the contract?

A. No, sir.

Q. Who did in your office?

A. I did not deliver it and I do not remember who delivered it.

Q. It is not a fact, is it, that you delivered it to Mr. Burns?

A. I may have delivered it in our office, not their office.

Q. I didn't say where it was delivered.

A. I thought the way you implied in the question, I thought you meant I brought it to the American Surety Company.

Q. You understand English?

A. Sometimes I may be dull, but otherwise as well as anybody else.

Q. You seem to have some difficulty in understanding the questions.

A. It depends upon how the questions are put.

Q. The last question was very vague?

A. It certainly was vague so far as I was concerned.

Q. Did you deliver the contract entered into between the Hartenfeld Bag Co. and the American Mills Company dated September 27, 1918, to Mr. Burns representing the American

136 Surety Company?

A. I don't remember, I believe I did.

Q. Would you say you did?

A. I believe I did.

Q. Where?

A. At our office in the Kimball Building.

Q. Who was there?

A. I think Mr. May was there at that particular time, and Miss Sutton.

Q. And how did Mr. Burns happen to be there?

A. He was summoned over there by telephone.

Q. Who telephoned him?

A. Miss Sutton or myself perhaps.

Q. You don't know, do you?

A. I don't know.

Q. Did you ever meet Mr. Burns before?

A. Yes, I met him the previous day.

Q. What day?

A. The day before the last contract was given to him.

Q. That is you met him on September 27, is that right?

A. Yes, sir.
Q. And with reference to this particular transaction how many times did you meet him?
A. Previous to that time?
Q. With reference to this particular transaction, how many times did you meet him?
A. At least two, perhaps more.
Q. You met him on September 27, 1918, in this transaction?
A. Yes.
Q. And on that occasion what did you do with reference to Mr. Burns?

137 A. Just told him we wanted a contract drawn up for future delivery of merchandise and I guess I gave him a skeleton of that first contract.

Q. You guess, but do you know?
A. I think I am sure about it.
Q. You think you are sure of it?
A. Yes, sir.
Q. And he took away that first draft of that contract?
A. So far as I recall, yes.
Q. When did you next meet Mr. Burns in the transaction?
A. Probably later in the day or the following day, I don't remember.
Q. Did you deliver him any paper at that time?
A. Sir.
Q. Did you deliver him any paper at that time?
A. That day or the following day?
Q. The second day you met him?
A. Yes, the changed contract.
Q. The complete draft of the contract?
A. Either the complete draft or the clause we wanted inserted in there.
Q. You don't remember. Did you deliver him on that day or any one of the two days a copy of the signed contract, or the signed contract?
A. Yes, delivered to him a signed contract as near as I remember.
Q. You did deliver to Mr. Burns a signed contract so far as you recall?
A. Yes, sir.
Q. Have you any recollection one way or the other whether you did or not?
A. So far as I recall, I think we did.
Q. And that was a complete draft, is that right?

A. The last day, I believe so.

138 Q. Do you remember whether it had signatures to it of the American Mill Company, signed by Mr. May, and the signature of the Hartenfeld Bag Co. signed by you to that contract?
A. Yes, sir; I believe it did.
Q. What did you next hear from the American Surety Company with reference to the bond after that?
A. They gave us a bond.

Q. How?
A. They delivered it over by messenger.
Q. To you?
A. To our office in the Kimball Building.
Q. Who was it handed to?
A. I don't know whether it was handed to the girl or myself.
Q. It got into your hands finally?
A. Yes, sir.
Q. What did you do with it?
A. Gave it to Mr. May.
Q. Where?
A. In the office there.
Q. In the Kimball Building?
A. Yes, sir.
Q. After that contract of September 27, 1918, between the American Mills Company and the Hartenfeld Bag Co. had been entered into did the Hartenfeld Bag Co. ship the merchandise in the contract mentioned to the American Mills Company or on its order?
A. Let me have that question read to me. It is a very long question.

(The question was read.)

A. Very little of the merchandise was delivered.
Q. How much of the merchandise was delivered?
A. I don't remember.
Q. Isn't it true that none of it was delivered?
139 A. I am sure that some of it was delivered, but a very small portion.
Q. When you say you are sure some of it was delivered upon what do you base that statement?
A. Wholly on my recollection.
Q. How much in dollars and cents was delivered?
A. I don't remember that.
Q. Are you saying now positively on your oath that some of it was delivered?
A. Yes, sir.
Q. After the contract of September 27, 1918, was first dictated by you what changes were made upon it?
A. If I can see the contract I can possibly tell you.
Q. You don't recall, do you?
A. Not off hand, no.
Q. Have you no recollection upon the subject?
A. No, sir.
Q. Do you know what became of that original draft of the contract?
A. Will you please repeat that?

(The question was read.)

A. No, I do not.
Q. You testified on your direct examination, didn't you, in the following language: "I remember the contract in brief or substantially," did you not make that statement?

A. I remember the contract in brief or substance.

Q. Do you remember that statement made by you on your direct examination, I remember the contract in brief or substance?

A. Yes, sir.

Q. And will you now say what your recollection of the contract in brief or substance is, if you don't know what changes were

140 made in the instrument after the first draft?

A. Yes, I will state that emphatically.

Q. Counsel showed you a paper which he designated as paragraph 22 of the bill of complaint, do you remember that?

A. No, I don't remember, I don't know.

Q. You don't remember his having shown that to you?

A. I remember him showing me several bills of complaint.

Q. He showed you several bills of complaint?

A. So far as I remember at least two, one Atlanta and one New York, something like that.

Q. You read them, didn't you?

A. Read the whole bills of complaint?

Q. Yes.

A. No.

Q. Did you read any part of it?

A. The part that he told me to read.

Q. Did you read it in its entirety, the part he told you to read?

A. I don't know whether I did or not.

Q. Isn't it a fact you did not read it at all?

A. The fact is I did read it if he told me to read it.

Q. How many pages of it did it cover which he told you to read?

A. I don't believe it covered more than a page.

Q. What was it with reference to?

A. With reference to that contract.

Q. Did you at the time you read that paper have before you the original contract of September 27, 1918?

A. No.

141 Q. You testified the paper he showed you was a copy of the contract, did you not?

A. Yes, sir.

Q. Had you compared it with the original?

A. I remember the original very well.

Q. I asked you if you compared it with the original?

A. I remember the original very well, but I could not compare it.

Q. You said a moment ago you were not sure of that contract in its entirety, that you remember the contract in brief or substance?

A. Oh, I don't remember it in its entirety, I don't remember possibly every phrase, I do know what the contract was for in substance.

Q. In other words, what you meant yesterday was that it was not a copy of the contract but it looked as though it was a copy of the contract.

A. I did not mean it was a copy of the contract in every sense of the word, so far as the language was concerned, but so far as the agreement and so far as the understanding was concerned it was.

Q. You mean the substance was the substance of the contract that is what you mean?

A. Yes. Of course, I cannot state that this was a copy taken from the typewriting machine with the original contract, if that is what you mean.

Q. That is exactly what I mean.

A. Yes.

Q. The contract between the American Mills Company and the Hartenfeld Bag Co. was signed on what date?

A. It was signed on two days.

142 Q. It was signed on two days; how many times was it signed?

A. I don't remember, I haven't any recollection now, possibly it was only signed once, and possibly it was signed on September 27 or the succeeding day.

Q. Now, it was only signed once?

A. It may have been only signed once, it may have been passed on and then brought back with the changes and signed the succeeding day.

Q. You don't recall whether the contract was signed more than once?

A. It was signed.

Q. When was it signed?

A. It was signed on the day we delivered it to the American Surety Company.

Q. On what date?

A. September 28th.

Q. And after that was signed, how long after that was it before the surety bond came over to your place?

A. Possibly half an hour or an hour.

Q. And that was then delivered by you to Mr. May, the surety bond?

A. Yes, sir.

Q. Mr. May went away with the contract and bond?

A. So far as I know.

Q. He did not leave it in your room, did he?

A. The bond might have been sufficient for the contract.

Q. I am asking you if he left it in your room?

A. You would have to ask him.

Q. Did you find it in your room after he elft?

A. I did not search for it.

Q. I insist that you answer the question, did you find it in your room after he left?

143 A. No, it would not be possible for me to find something he had not lost.

Q. I am asking you if you found it after he left?

A. It would not be possible to search for a thing of that kind.

Q. That is your best answer?

A. Yes, sir.

Q. It suits me to a T.

A. Yes, sir.

Q. Did Mr. May leave that contract and the bond with you?

A. Sir?

Mr. Moses: Read the question.

(The question was read.)

A. I believe he took the bond with him and the contract both, so far as I can remember.

Q. And when did you next see Mr. May after that?

A. Several days later.

Q. About when?

A. Two or three days later.

Q. Where?

A. At the Kimball Building.

Q. Did he come in unannounced, or had you heard from him that he was coming?

A. I don't remember, he may have wired me.

Q. He did?

A. Did he?

Q. I am asking you?

A. He may have wired me.

Q. Who was with him when he came?

A. Mr. Haas.

Q. And what was said and by whom?

A. Oh, substantially a check was given to me.

Q. I asked you what was said and by whom?

A. (No answer.)

Q. I don't know why you are hesitating, Mr. Hartenfield.

A. It is very hard to answer a question the way it is put sometimes.

144 Q. The question is not plain to you?

A. What was said and by whom?

Q. Yes.

A. Considering the way it was asked, and considering the circumstances, it is not so very plain, no.

Q. Somebody did some talking there?

A. I may have done some talking.

Q. Did Mr. May and Mr. Haas?

A. They came here for the purpose of paying money.

Q. What was said by either of them, that is a plain question, isn't it?

A. Yes.

Q. Yes.

A. Substantially they said their purpose in coming here was to have that surety bond binding, and that they had a check there for a certain amount of money.

Q. Did they tell you how much.

A. $22,100.00. And that they wanted me to have that deposited and to give them a check immediately for a statement which Mr. May had covering over $21,000.00.

Q. Have you seen that statement since that day?

A. I saw it, it is right here.

Q. The witness is pointing to a paper on the table which is marked American Surety Company's Exhibit 6 for identification. You say

that Mr. May had with him the original of which American Surety Company's Exhibit 6 for identification is a photostatic copy?

A. Yes, sir.

Q. Did he show it to you?

A. Yes, sir.

Q. What did he say to you?

A. I should give him a check for that, certified check.

Q. What did you say?

A. It was agreeable.

Q. You said you would, did you?

A. Yes, sir.

145 Q. Then what was done?

A. Then the three of us went over to the Foreman Bros. Banking Co.

Q. Who had the check for $22,100.00?

A. I don't remember whether I had it when I went to the Bank or whether they held it and gave it to me at the bank. I don't recall that.

Q. You don't recall that?

A. No, sir.

Q. You went over to Foreman Bros. Banking Co.?

A. Yes, sir.

Q. What was done there?

A. The check was deposited for our credit.

Q. Which check?

A. $22,100.00.

Q. Have you seen that check since?

A. I saw a photographic copy of it yesterday.

Q. That is the original of which the photostatic copy of American Surety Company's Exhibit 1 for identification is supposed to be a copy, is that right?

A. Please repeat that question.

(The question was read.)

A. Well, it is supposed to be a copy, I don't know and it looks like a photographic copy, exactly like the check that was deposited.

Q. And after that was deposited what, if anything, was handed to either Mr. Haas or Mr. May?

A. A certified check.

Q. Whose certified check?

A. Our certified check.

Q. You mean the Hartenfeld Bag Co.'s check?

A. Yes, sir.

Q. Is that the original of which American Surety Company's Exhibit 2 for identification is supposed to be a copy?

A. Yes, sir.

146 Q. Where was that check made out by the Hartenfeld Bag Co., in its office?

A. I believe I made that out at the Kimball Building, not at the office.

Q. In the Kimball Building?

A. Yes, sir.

Q. Who carried that check over to the Foreman Bros. Banking Co.?

A. I did.

Q. Was that check certified by Foreman Bros. Banking Co. before it was delivered to the American Mills Company?

A. Yes, sir.

Q. Who had it certified?

A. I did.

Q. And what was the check of $21,067.20 given in payment of?

A. Of the statement that Mr. May rendered, in full of the account.

Q. You mean in payment of the statement of which American Surety Company's Exhibit 6 is supposed to be a copy?

A. Yes, sir.

Q. Previous to September 27, 1918, had the American Surety Company entered into any bonds or guaranties for the Hartsfeld Bag Co.?

A. They issued several bonds.

Q. At whose request had the American Surety Company issued those several bonds?

A. Why, at my request.

Q. With whom did you deal at the American Surety Company, with Mr. Burns?

A. No, I never saw Mr. Burns previous to that.

Q. Who was the man you dealt with at the American Surety Company?

A. Mr. S. Wakem.

Q. Who is he?

A. Representative of the American Surety Co.

Q. What, a solicitor?

A. Yes, sir.

147 Q. Did they issue any bonds to you guaranteeing the performance of any contracts entered into by the Hartsfeld Bag Co. previous to September 27, 1918?

A. I don't know what the nature of the contract was, they issued bonds for us.

Q. For the performance of contracts entered into by the Hartsfeld Bag Co.?

A. I don't know.

Q. Don't you know?

A. I don't remember exactly what the bond was for, maybe for delivery within a certain period of time.

Q. You don't know, you have no recollection on that?

A. I haven't any exact recollection on it.

Q. Do you know in whose favor those bonds, or any of those bonds were issued by the American Surety Co. what concern?

A. Yes, several bonds were issued for William Mosser & Company New York City.

Q. Several bonds were issued?

A. Yes, sir.

Q. Did you have contract with William Mahon?
A. Yes, sir.
Q. The American Surety Company gave bonds to secure the performance of those contracts?
A. I don't know what they gave bonds for.
Q. Did you ever read the bonds?
A. Not the body of the bonds, I did not, the whole statement.
Q. What was the purpose of their giving the bonds?
A. The purpose of their giving the bonds was something they themselves know, I don't know. The sum and substance was whenever a man requested a bond for the delivery of merchandise we simply made it out from our side of the contract and sent it over to the American Surety Company and they passed on it, a long clause in there. So far as I was concerned it had nothing to do with me, it was up to the purchaser, it was up to him to tell me what was written in the bonds.
Q. You got bonds in the American Surety Company and in so doing signed applications for bonds in the American Surety Company?
A. I believe I signed applications, I don't remember.
Q. Didn't you sign a bond indemnifying the American Surety Company against any loss on this bond?
A. I don't remember.
Q. You deposited securities with the American Surety Company to induce them to go on a bond for the Harrisfield Bag Co.?
A. I did not. None whatsoever so far as I remember.
Q. Did you deposit any moneys with them to secure them?
A. No, sir.
Q. Did you ever issue any statement of the financial condition of the Harrisfield Bag Co.?
A. I don't remember. If there was any statement issued I had nothing to do with the making up of the statement. I signed it and it was sent in.
Q. Was there any sent in to the American Surety Company?
A. I don't remember.
Q. Do you recall whether they ever asked you for one?
A. I don't remember.
Q. But you do say after telephoning over on the day in question, September 27, 1918, Mr. Burns came there and you gave him a contract and they gave you a bond?
A. That is the truth of it, Mr. May was there.
Q. You did not have to give the American Surety Company anything other than to request that they execute the bond, is that right?
A. I supposed they knew what they were doing.
Q. Mr. Burns came over to the office where you and Mr. May were in the Kimball Building, was there any conversation between Mr. May and Mr. Burns?
A. I don't remember.
Q. You don't know?
A. I don't remember.
Q. How long was Mr. Burns there?
A. I don't remember.

Q. Now, you signed, did you not, at various times for the Hartenfeld Bag Co. various financial statements issued by that company, is that right?

A. I told you how I signed them.

Q. I asked you if you did not sign them.

A. I don't remember.

Q. You don't remember whether you signed them several times?

A. I don't know.

Q. It was a matter that made no impression on you, you just signed them.

A. No, sir; didn't make any impression.

Q. In other words, whenever a statement was handed to you to sign, by the Hartenfeld Bag Co., you signed it?

A. Naturally I knew where the statement would come from?

Q. Who handed them to you?

A. Mr. Brunswick.

Q. Did Mr. Simon?

A. Mr. Simon would go to Mr. Brunswick and later he would go over the facts and figures.

150 Q. And you would sign it and would not pay any attention to it.

A. I would sign it.

Q. Just because you were asked to?

A. No, because it was Mr. Brunswick; he was paid for doing it.

Q. He was paid for making up the statement?

—. He was paid for doing his work.

Q. You never looked at the statement to see whether they were telling the truth?

A. I supposed they were telling the truth.

Q. You didn't spend any time on it?

A. No, sir.

Q. It was not a matter of any great importance?

A. That is not the point; I am telling exactly how I signed the statements, I answered your question.

Q. Some of those statements might have been false, is that right?

A. They might have been very correct too.

Q. I am asking you if they might have been false, not if they might have been correct?

A. Why should I answer that question, why not interrogate the people that made up the statement?

Q. Might not this statement have been false?

A. We might all die suddenly, too.

Q. You did not look into the question whether they were false or true though?

A. I knew they were true. I know they were true so far as they applied to the company.

Q. If they made up a statement for you to sign for R. G. Dun or Bradstreets, it must have been a true statement?

A. Not necessarily must have been, it should have been.

151 Q. What do you mean, it should have been?

A. Just exactly what it implies.

Q. You mean the man who made it out should not have made out a false one?

A. That is it.

Q. If you signed one September 1, 1918, to the best of your knowledge and belief it was true?

A. Yes, sir.

Q. And you believed it was true because they asked you to sign it?

A. Not because they asked me to sign it, they went through the accounts and inventory.

Q. They asked you to sign it?

A. Why would they, that was the nature of their work.

Q. Did they ask you to sign it, did they ever ask you to sign one?

A. Who do you mean by they?

Q. The two gentlemen whom you have mentioned as being in your employ.

A. Yes, it was understood that I would sign a statement.

Q. It was understood that you would sign one. When you signed the statement they handed to you of the financial condition of the Hartenfeld Bag Co. you knew that was being signed for the purpose of delivery either to R. G. Dun & Company or Bradstreets, or both, did you not?

A. Not necessarily.

Q. Who was that to be delivered to?

A. It may have been delivered to a private individual or a corporation.

Q. You mean some person who was doing business with the Hartenfeld Bag Co.?

A. Yes, sir.

Q. Don't you know as a matter of fact one of these state-
152 ments was delivered to the American Surety Company after being signed by you?

A. I would not say; I don't remember.

Q. Isn't it true that you also signed a statement of the financal condition, showing its assets and liabilities, of the Hartenfeld Bag Co., to the Foreman Bros. Banking Co.?

A. I signed several statements.

Q. For whom?

A. Different companies.

Q. Did you sign a statement to the Foreman Bros. Banking Co.?

A. I believe I signed a statement to the Foreman Bros. Banking Co.

Q. Was it true at the time you signed it?

A. I answered that.

Q. I am asking you in regard to the statement you signed to Foreman Bros. Banking Co.

A. I said it should have been, I answered the question.

Q. That is your best answer?

A. Yes, sir.

Q. Very well. After the account of the Hartenfeld Bag Co. against the American Mills Company for $9,225.00 had been assigned to the Commercial Credit Company the Hartenfeld Bag Co. discounted the notes of $4,650.00 and $4,485.08 which the American Mills Company had given to the Hartenfeld Bag Company for your account, did they not?

A. I believe so.

Q. And who attended to the banking business at the Forema Bros. Banking Co.?

A. Mr. Simon.

Q. You had nothing to do with it?

A. Very little.

Q. Did you have anything to do with the discounting of those two notes?

A. I don't believe I did, I don't remember.

153 Q. Do you remember they were being discounted at the time they were discounted? Were you present at the time?

A. I don't remember; I may have been away.

Q. What is that?

A. I don't remember; I may have been out of the city for possibly two weeks or so.

Q. Do you know who endorsed these two notes?

A. Naturally I would endorse them.

Q. As president and treasurer of the Company?

A. Yes, sir.

Q. What was the custom, to endorse these in blank and leave them in the office?

A. Yes, sir.

Q. Let them use them as they pleased?

A. If they thought they needed them in a certain direction.

Q. They would use them without consultation with you?

A. Yes, in many instances they would never consult me about it at all.

Q. What were you doing in the business of the Hartenfeld Bag Co.; we are talking about the months around August, September and October, 1918?

A. I was very little there.

Q. I asked you what you did in the business?

A. I don't really know; I cannot answer the question.

Q. Sort of abandoned the business?

A. Yes, sir.

Q. Let it go to the dogs?

A. Not necessarily; I just simply did not give it the attention I had previously.

Q. Beginning what date did you begin not giving the business the attention you had previously?

A. About a year.

154 Q. Even on September 1st, when you signed that financial statement, you hadn't anything to do with the business, simply let it go?

A. I was not doing what I had always done before, devoting time to it, and naturally if you don't devote time to it you abandon it more or less, technically perhaps not so, practically absolutely.

Q. Who was the real head of the Hartenfeld Bag Co. during that time?

A. There was no real head; figuratively I was always.

Q. Who handled the transactions?

A. The transactions almost handled themselves; the office boy knew about the prices and quoted prices.

Q. You carried on a good deal of the correspondence?

A. Yes, sir.

Q. Just about as much as you did the year previous?

A. No.

Q. You did with the American Mills Company.

A. It might be I favored them.

Q. Isn't it true that practically all the mail sent by you or the Hartenfeld Bag Co. to the American Mills Co. was signed by you?

A. No, sir.

Q. That is not true?

A. No, that is not true.

Q. At the time you entered into contract dated September 27, 1918, on behalf of the Hartenfeld Bag Co. with the American Mills Company you hadn't any intention of delivering that merchandise, did you, within 75 days?

A. You say I had no intention?

Q. No.

A. You are wrong about that.

155 Q. You had an intention?

A. We had several contracts previous to that and we delivered the goods, and I don't see why our intention should be misconstrued at this time.

Q. I am not misconstruing it, I am asking you the question.

A. I am answering it to the best of my ability.

Q. Was it your intention if you did not deliver those goods at that time that you would repay the $22,100.00?

A. The contract recited the fact that lack of delivery would compel us to pay whatever was not delivered.

Q. I am not asking you what the contract stated, what was your intention?

A. Our intention was always to pay.

Q. And did you pay—did you repay the $22,100.00 to the American Mills Company?

A. No, sir.

Q. Did the Hartenfeld Bag Co.?

A. No, sir.

Q. So far as you know did anybody on behalf of the Hartenfeld Bag Co. pay back to the American Mills Company the $22,100.00 recited in that contract of September 27, 1918?

A. No, sir; nobody.

Q. Do you know a man by the name of Ames who was connected with the Waste Merchants Mercantile Agency, New York City?

A. Ames?

Q. Yes.

A. No, sir.

Q. Do you know a man whose name sounds something like that connected with that concern?

A. No, sir.

Q. Don't you remember as a matter of fact that in Novem-
156 ber, 1918, a gentleman representing the Waste Merchants Mercantile Agency called upon you in Chicago with reference to the Hartenfeld Bag Co.?

A. I had several calls from the Waste Trades Journal, I don't remember.

Q. Don't you remember you gave them a statement of the net worth of the Hartenfeld Bag Co. as being $120,000 over and above its liabilities?

A. I don't remember.

Q. Would you say you did not?

A. I would not say either; I don't remember.

Q. Don't you know as a matter of fact at that time or thereabouts you sent to the Waste Merchants Mercantile Agency a financial statement of your personal worth indicating an individual net worth on yourself, over and above your liabilities, of $500,000.00?

A. I remember I gave a personal statement drawn up by my accountants, drawn up by Mr. Brunswick.

Q. Of your personal worth?

A. Yes, sir.

Q. Were those statements true at the time that they were delivered?

A. They were true so far as I know.

Q. So far as you knew then?

A. Yes.

Q. You thought they were true, didn't you?

A. Yes, sir.

Q. You thought that the Hartenfeld Bag Co. was perfectly solvent on September 27, 1918?

A. Yes, sir.

Q. And on October 3, 1918?

A. So far as I knew, yes.

Q. And you didn't tell anybody it was insolvent?

A. I had no reason to tell anybody.

157 Q. And you did not believe they were insolvent on that date?

A. I had no reason to believe it.

Mr. Moses: I think that is all.

Redirect examination.

By Mr. Rowe:

Q. Mr. Hartenfeld, upon your direct examination and your cross examination, you have told us all you can recall of the transactions between Mr. May and yourself on the 27 and 28 of September, 1918, here in Chicago?

A. So far as I can remember, yes, sir.

Q. Did Mr. May at any time on September 27 or September 28, 1918, state to you that he wanted to buy any bags or burlap?

A. He just simply wanted burlap and bags to pay for his debt, that is all.

Q. That is all true, but did he state to you that he wanted to buy bags and burlap aside from his debt?
A. No, sir.
Q. Did he tell you in Chicago on September 27 or 28, 1918, that he was going to bring up a check from Atlanta for $22,100?
A. No, sir.
Q. When Mr. May left with this bond and the contract on September 28, 1918, did he tell you he expected to return within a few days?
A. No, sir.
Q. Who is this Mr. Brunswick you talk about?
A. A man who used to take care of our personal accounts.
158 Q. An accountant, is he?
A. Accountant and lawyer; he is more than an accountant.
Q. What did he do for you?
A. Sir?
Q. What was his business or connection with you?
A. He was going through the accounts of our Company, that is all the connection he had with us.
Q. Auditing your accounts?
A. Going through the accounts, being a bookkeeper or auditor, or whatever else you might call it.

Mr. Rowe: That is all.
(Signed) EDWARD J. HARTENFELD.

159 Depositions taken at Chicago, Ill., September 16th, 1919.

J. V. Norcross, Esq., Counsel for Plaintiff.

Hamilton Moses, Esq., Counsel for Defendant.

JAY J. REYNOLDS, heretofore called as a witness on behalf of the American Surety Company of New York, plaintiff, was recalled, and testified by deposition as follows:—

Direct examination.

By Mr. Norcross:

The paper you are exhibiting to me is a copy of the general contract of indemnity of the Hartenfeld Bag Company to the American Surety Company. I am familiar with the signature of E. J. Hartenfeld, president of the Hartenfeld Bag Co. I can identify his signature on the paper shown me.

Paper identified by witness, offered in evidence and marked Plaintiff's Ex. 1 of Sept. 16, 1919.

Witness: This general contract of indemnity was held by the American Surety Company at the time it executed the bond of the American Surety Company for the Hartenfeld Bag Company. The annual premium on that bond at our schedule of rates was

$221.00. The premium on the bond was paid by Moore,
160 Case, Lyman & Hubbard. They were the insurance brokers, who brought the business to us, and to whom we paid a commission. I think the premium was paid in December, 1918. I took the check for the premiums, that had been paid by Moore, Case, Lyman & Hubbard for the Hartenfeld Bag Company, and delivered to them a refund of the premiums paid on the ground that a man, who apparently was in the employ of Moore, Case, Lyman & Hubbard, came to our office, and told us that they had never been reimbursed, and, as we don't hold brokers for the payment of premiums, we agreed to refund them. I took the check of the American Surety Company of New York, payable to Moore, Case, Lyman & Hubbard, and delivered them the check on February 26th. I identify paper shown me as the check of the American Surety Co. which I delivered to Moore, Case, Lyman & Hubbard on February 26, 1919.

Paper identified by witness, offered in evidence and marked Plaintiff's Ex. 2 of Sept. 16, 1919.

Witness: When I paid this check to Moore, Case, Lyman & Hubbard, they executed a receipt which I identify.

Paper identified by witness, offered in evidence and marked Plaintiff's Ex. 3 of Sept. 16, 1919.

161 WILBUR F. LANGILLE, called as a witness on behalf of the American Surety Company of New York, plaintiff, having been first duly sworn, testified by deposition as follows:—

Direct examination.

By Mr. Norcross:

I am assistant office manager of Moore, Case, Lyman & Hubbard, insurance brokers, Chicago, Illinois. I occupied that position during all of 1918 and 1919 down to date. I see towards the collecting and payment of premiums on bonds. I saw the check, Plaintiff's Exhibit 2 of this date about Feb. 26, 1919. Mr. Reynolds handed it to me. He asked me if the premiums on these bonds had been paid. I said they had not and he asked me to take the check in payment of the check which I had paid him for the premium on these bonds written by the Surety Co. for the Hartenfeld Bag Co. Mr. Reynolds of the American Surety Company told me there was some litigation in reference to the bond in this case and wished me to take their check to offset the check I have given in payment for the premium on the bond for $22,100, and I took the check. I knew that the Hartenfeld Bag Co. did not pay these premiums to Moore, Case, Lyman & Hubbard. Moore, Case, Lyman & Hubbard collected the amount of the check, Plaintiff's Exhibit 2 of Sept. 16, 1919.

162 Cross-examination.

By Mr. Moses:

It was the practice in writing insurance for the Hartenfeld Bag Company, for my firm, Moore, Case, Lyman & Hubbard, to pay the premiums upon such insurance and then collect them from Hartenfeld Bag Company, and we received bills for those bonds from the American Surety Company. When we received these bills we charged them against the Hartenfeld Bag Company, charging the amount of the premiums. It was our practice to collect these premiums from the Hartenfeld Bag Company, through our brokers.

Redirect examination.

By Mr. Norcross:

Moore, Case, Lyman & Hubbard never got any money on account of this bond in question either from the Bag Co. or our broker.

163 Depositions taken at Atlanta, Ga., September 25, 26, 27, 1919.

Allan C. Rowe, Esq., Counsel for Plaintiff.
Hamilton Moses, Esq., Counsel for Defendant.

A. M. BERGSTROM, called as a witness on behalf of the American Surety Company of New York, plaintiff, having been first duly sworn, testified by deposition as follows:

Direct examination.

By Mr. Rowe:

I am cashier of the Third National Bank of Atlanta, Ga. The American Mills Company is a depositor at said bank, and I am familiar with the signatures of Mr. Armand May and Mr. Leo Strauss of that company. I produce here a check dated October 1st, 1918, of the American Mills Company. The signature on the bottom of that check is in the handwriting of Mr. L. C. Strauss and I recognize the other signature as being that of Mr. Armand May. That check was presented to our bank for certification on October 1, 1918, and was certified by me and returned to whoever presented it. That check was subsequently presented to our bank for payment and was paid Oct. 5, 1918. I have reason to know that it
164 was deposited in the Foreman Bros. Bank of Chicago and from there forwarded to Atlanta for collection, when the check was returned to our bank it bore the stamps and endorsements now on it. It has since been in the possession of the 3rd National Bank of Atlanta. It is the practice of the Third National Bank of Atlanta to retain checks that have been certified by the bank and subsequently presented to it and paid.

Check produced by witness, marked Plaintiff's Exhibit 1 of Sept. 26, 1919.

Witness: There was deposited by the American Mills Company on October 5th, 1918, a check for $21,087.20.

Stipulated that check for $21,087.20 drawn by Hartenfeld Bag Co. to American Mills Co. for that amount was deposited to the credit of the American Mills Co. with the Third National Bank of Atlanta on October 5, 1918, and was thereafter paid to the Third National Bank of Atlanta and credited to the American Mills Co.; the check being drawn on Foreman Bros. Banking Co., Chicago.

Statement dated Oct. 1, 1918 on letter head of American Mills Co. designated "Statement of account against Hartenfeld Bag Co." and endorsed on bottom "paid $21,080.20; 10/3/18. A. May Pres." offered in evidence and marked plaintiff's Ex. 2 of Sept. 26, 1919.

Stipulation.

It is stipulated by the American Mills Company that the paper marked "Plaintiff's Exhibit #2" of September 26th, signed
165 "American Mills Company by A. May," is the signature of Mr. May.

Stipulated that notwithstanding the witness Armand May is present his deposition taken at Atlanta be read in evidence.

ARMAND MAY, called as a witness on behalf of the American Surety Company of New York, plaintiff, having been first duly sworn, testified by deposition as follows, the same appearing below in the question and answer form.

Direct examination.

By Mr. Rowe:

Q. Mr. May, where do you live?
A. Atlanta, Ga.
Q. What is your connection with the American Mills Company?
A. President.
Q. How long have you been such President?
A. Eight years.
Q. What is the general nature of business of the American Mills Company?
A. General Jobbing business.
Q. Confined to any particular lines?
A. We handle burlap, twines, cordage and specialties.
Q. That corporation was organized under the laws of the State of Georgia?
A. Yes, sir.
Q. And has its principal office and place of business here in Atlanta?
A. Yes, sir.
166 Q. Do you know Mr. Edward J. Hartenfeld of Chicago?
A. Yes, sir.

Q. How long have you known him?
A. About seven years.
Q. Have you ever had any business dealings with the Hartenfeld Bag Company of Chicago?
A. Yes, sir.
Q. And over what period?
A. About seven years.
Q. What is the general nature of those dealings?
A. As a rule, buying burlap or burlap bags.
Q. About what was the yearly extent of that business for the last two years?
A. To the best of my recollection about $100,000 a year.
Q. Will you please state the general course of the purchase of the bags and burlap by your company from the Hartenfeld Bag Company, the general method of doing business?
A. The general method is, when we buy burlap from them they usually—when they sell us they sell it for cash. In a few instances we make advances for the purchase of bags for our account, especially when it is necessary for us to get his assistance to help us secure certain goods.
Q. That is to say, you would buy bags or burlap from time to time from this Hartenfeld Bag Company and then you would pay them either in cash or in notes, is that right?
A. Yes, sir; in advance.
Q. And they would subsequently ship the goods to you or to your order?
A. Yes, sir.
167 Q. During 1918, say in June, July, August and September, did you purchase any bags or burlap from the Hartenfeld Bag Company, and when I say you I mean the American Mills Company?
A. I can't say whether we purchased any in June, July and August, but he owed us a lot of bags.
Q. When you say he owed you a lot of bags, will you explain what you mean?
A. Well, we don't speculate as a rule we sell and then, as a rule, buy. If we sell an order to a customer say 50,000 inside coffee bags, we might buy those bags to cover our sales, and in cases where we are not able to get them quickly we have been, up to that time, purchasing considerable from the Hartenfeld Bag Company.
Q. During the months of June, July, August and September, 1918, did the Hartenfeld Bag Company owe you any considerable amount of bags or burlap for delivery?
A. I think they did.
Q. When these bags were received by you, during those months, or about that time, did you make any claims against the Hartenfeld Bag Company for shortages?
A. We made quite a few claims.
Q. Have you any idea as to the amount?
A. Why, it amounted to quite a few thousand dollars in value, but we were principally interested in getting the bags and making shipments of the bags.

Q. Well, did you render any claims against the Hartenfeld Bag Company for inferior deliveries?

168 A. I don't understand what you mean by inferior deliveries.

Q. That is to say, deliveries of goods which were shipped to you and on examination did not come up to the terms of the purchase?

A. Yes, sir.

Q. You called those rejects, did you not?

A. Well, if the shipment is refused we call it a refused shipment. If it went through and the bags were unpacked and rejected we called those rejects.

Q. But at times you have to make allowances to your customers, do you not?

A. Yes, sir; quite often.

Q. Well, during this period, that is to say, the summer of 1918, did you have many claims against the Hartenfeld Bag Company for cases where you had been compelled to make allowances to your customer where the bags had been rejected?

A. We had quite a few cases, not so much a question of making allowances as replacing, a man shipping certain bags to us and returning the bags and wanting those bags replaced with proper merchandise. The bag market at that time was so high it was necessary for us to replace the bags, and we could not make allowances because it would be too serious, people wanting the bags replaced with the same merchandise, and the market had advanced considerably.

Q. During that period, that is so say June, July, August and September, you frequently wrote to the Hartenfeld Bag Com-

169 pany, did you not, complaining of a failure to make deliveries?

A. Yes, sir.

Q. Mr. May, I show you what purports to be a photostatic copy of a letter dated June 25, 1918, addressed to Mr. E. J. Hartenfeld, c/o Hartenfeld Bag Company, Chicago, and written on the letter-head of the American Mills Company, which letter bears, in the upper right-hand corner, the initials, "A. M.," and what purports to be a photostatic copy of two invoices of the Hartenfeld Bag Company against the American Mills Company, both numbered 1674, and I ask you to look at that and see if you are able to state whether you dictated or signed the original of that letter and sent it to Mr. Hartenfeld about the time that letter bears date?

A. Yes, sir.

Q. Was the original of that letter dictated by you?

A. Yes, sir.

Letter and enclosures identified by witness received in evidence and marked Plaintiff's Exhibit 3 of Sept. 26, 1919.

Q. I show you, Mr. May, a copy of a letter produced by your counsel, dated 7-6-1918, and ask you whether you dictated the original of that letter or not.

A. I dictated the original, but I don't know if there has been any changes made; I could not tell. Of course I can't tell whether this

is exactly like the letter which the Hartenfeld Bag Company received or not. This is a copy out of our files.

170 Q. It is your practice to keep a fairly correct copy of letters that you send?

A. Well, we keep a fairly correct copy, but sometimes we might correct it—write them and make corrections without making corrections on the duplicate, and I can't say.

Q. I show you, Mr. May, what purports to be a photostatic copy of a letter dated 7-6-1918, and addressed to the Hartenfeld Bag Company, Chicago, on the letter head of the American Mills Company, and ask you to look at that and say if you remember dictating that letter?

A. Is that the same letter?

Q. Yes, that is the same letter.

A. Well, let me have the other letter, and I will tell you if there are any changes in it. (Comparing letters.) That is a copy.

(Photostatic copy identified by witness, received in evidence and marked Plaintiff's Exhibit 4 of Sept. 26, 1919.)

Q. I show you, Mr. May, what purports to be a photostatic copy of a letter dated 7-9-1918, addressed to Hartenfeld Bag Company, Chicago, on the letter head of the American Mills Company, and ask you to look at that and see whether you dictated the original of that letter on or about the date it bears date.

A. I think that is a copy.

(Photostatic copy identified by witness, received in evidence and marked Plaintiff's Exhibit 5 of Sept. 26, 1919.)

171 Q. I show you, Mr. May, what purports to be a photostatic copy of a letter dated 7-16-1918, addressed to Hartenfeld Bag Company, Chicago, and purports to be signed by American Mills Company, and state whether you recall dictating and signing the original of that letter on or about the date it bears date.

A. Yes, that looks like a copy of it.

(Photostatic copy identified by witness, received in evidence and marked Plaintiff's Exhibit 6 of Sept. 26, 1919.)

Q. I will show you, Mr. May, what purports to be a photostatic copy of a letter dated 7-18-1918, addressed to Mr. E. J. Hartenfeld, c/o Hartenfeld Bag Company, Chicago, on the letter head of American Mills Company, signed by you, and ask you whether you recall dictating and signing the original of that letter on or about the date it bears date.

A. Yes, this looks like the letter.

(Photostatic copy identified by witness, received in evidence and marked Plaintiff's Exhibit 7 of Sept. 26, 1919.)

Q. I show you what purports to be a photostatic copy of a letter dated 8-28-1918, on the letter head of American Mills Company, addressed to Mr. E. J. Hartenfeld, c/o the Hartenfeld Bag Company, Chicago, and purporting to be signed by you, and ask you whether

you recall signing the original and the dictating of that letter
172 about the date it bears date?
A. Yes, sir; that looks like the letter.

(Photostatic copy identified by witness, received in evidence and marked Plaintiff's Exhibit 8 of Sept. 26, 1919.)

Q. Now the next one is Sept. 3d or 4th, I cannot make out which it is. I show you what purports to be a photostatic copy of a letter dated Sept. 3d or 4th, 1918, addressed to Mr. E. J. Hartenfeld, c/o Hartenfeld Bag Company, Chicago, purporting to be signed by you, and ask you whether you recall dictating and signing the original of that?

A. I don't think the one I signed had these marks on it.

Q. Well, aside from the checking which appears on them, you think it is a correct copy?

A. Yes, sir.

(Photostatic copy identified by witness, received in evidence and marked Plaintiff's Exhibit 9 of Sept. 26, 1919.)

Q. I show you what purports to be a photostatic copy of a letter dated 9-9-1918, addressed to Mr. E. J. Hartenfeld, c/o Hartenfeld Bag Company, and signed by you, and ask you whether you recall dictating and signing the original of that letter about the date it bears date?

A. Yes, sir.

(Photostatic copy identified by witness, received in evidence and marked Plaintiff's Exhibit 10 of Sept. 26, 1919.)

173 Q. About how much was the aggregate claims of American Mills Company against Hartenfeld Bag Company on or about August 29, 1918?

A. I cannot answer that question because it is a matter of record.

Q. Well, have you any record from which you could refresh your recollection?

A. What is the date, please?

Q. About August 29, 1918?

A. I do not want to hazard a guess, and that is something I can not state from these papers. You go deeper into it and you will find out.

Q. I show you a sheet representing the amounts between the Hartenfeld Bag Company and American Mills Company, and ask you if you can determine from that about the approximate amount they owned you, or the amount of your claims about the first of September or the last of August, 1918.

(No answer.)

Q. Mr. May, you remember testifying before Mr. Adams in bankruptcy proceedings against the Hartenfeld Bag Company here in Atlanta last February?

A. I know I testified there.

Q. Do you remember on that occasion producing or that bearing the paper which you now have in your hands?

A. I don't know if this is the one. I produced a copy of the letter about but you see you are asking me something on August 20th——

Q. About that date?

A. If you come down a little bit further, say Sept. 20 or 25th, or I mean Oct. 1st, then I can tell you, but I cannot answer that question.

Q. Well, have you any method by which you can refresh your recollection so as to testify as to the amount of your claims about the last of August or the first of September here or at your office?

(No answer.)

Q. All claims?

A. Well, I can tell you how much bags and merchandise he owed us, and that is what we were after, but as far as the amounts we advanced him, that is a matter I think you could find out from our bookkeeping department.

Q. You said you thought you could state how much bags or merchandise he owed you at that time. Will you please do so?

A. On August 20th—what I am giving you now is from my best recollection, I did not keep the books— —

Q. What I want is your best recollection approximately, about that date?

A. I think he owed us a carload of jute bags and about 20,000 mills sulfite bags and he owned us the bags that were to be replaced by Savannah, Ga., and Macon, Ga., Huntsville, Ala., and I think Dewar, S. C., and several others, I cannot remember them all.

Q. Now, can you give us approximately about the amounts, in money, of those claims?

A. Well, we were interested in getting the bags, we were not thinking about getting the money; we were figuring out the value of those bags.

Q. Was it $5,000.00 roughly?

A. On August 20, I think it must have amounted to about $22,000.00, but that is purely a guess and that does not include a shipment that was made to us on August 20th, which would naturally be that much less.

Q. But you think, without including the shipment about August 20th, it was somewhere around $10,000 or $15,000?

A. About $22,000, but that is purely guess, so far as my memory is concerned.

Q. You have just referred to this transaction of August 20th, the sale of bags; will you please state what that was?

A. Butterfield wired us offering us a car of bags consisting of some No. 1 sewed burlap and 10,000 wool bags, if I am not mistaken, on the basis of 90 days terms, subject to inspection.

Q. Was that by telegram?

A. He telegraphed us first, if I am not mistaken, and Mr. Levitt ordered the sale over the telephone, with the distinct understanding, however—— .

Q. Have you the telegram which he sent?
A. I don't know.
Q. Will you please look and see if you have it here?
A. Here (exhibiting) is the bill and is marked terms net 90 days. I did not know that you wanted that, Mr. Rowe.
Q. I did not know what it was?
A. Mr. Rowe, I have his two telegrams, one dated Aug. 20th, from Hartenfeld, which reads as follows:

"Will ship more coffees this week investigating shortage of four-
teen bales. Are you interested carload meals one hundred
176 forty dollars thousand our confirmation wire immediately
HARTENFELD BAG CO."

That is signed, "Hartenfeld Bag Company," addressed to American Mills Company, Atlanta, Ga. A letter dated Chicago, Aug. 19th, naturally reaching us on Aug. 20th. We sent a reply under date of Aug. 23d:

"Telegram received Will not purchase further goods until all other matters settled Just received two samples from Huntsville Ala. mailing you same under separate cover which are absolutely rotten You are simply ruining our business All business we do in the future goods will have to come to Atlanta for inspection first writing fully."

Q. That was signed how?
A. American Mills Company. Then we have another telegram dated August 26th, received in Atlanta 3:27 P. M. from Hartenfeld Bag Company to American Mills Company, as follows:

"Your letter let us ship the meals and burlap direct to Atlanta witness will either come to Atlanta or have your Mr. Lovitt here and take up all matters."

Q. And signed by whom?
A. Hartenfeld Bag Company.
Q. Well, proceed? What took place after the exchange of those telegrams?
177 A. To my recollection Mr. Lovitt spoke to him and told him we would buy the car of bags.
Q. Where was Mr. Lovitt?
A. Here in Atlanta.
Q. And he talked to Mr. Hartenfeld in Chicago?
A. I don't know whether he talked to Mr. Hartenfeld or Mr. Simon, I am inclined to believe that he spoke to Mr. Simon, because Mr. Simon was looking after it because Mr. Hartenfeld was sick at the time, but I am not sure.
Q. Did Mr. Lovitt telephone in your presence?
A. I don't remember whether it was in my presence or not, but he told me the conversation after he was through with it, and I think he confirmed it later; I am not sure.
Q. Well, did you purchase this carload of merchandise about August 29th from Hartenfeld Bag Company?

A. We purchased the car load with the distinct understanding he was to first ship the other goods we had been clamoring for on our contracts.

Q. Were there any other written communications in regard to this purchase other than this telegram that you have identified?

A. I think there are.

Q. Will you please produce them?

(No answer.)

Q. When this transaction, the purchase of this merchandise, was negotiated then, I understand it was negotiated over the telephone is that right?

A. We had some telegrams. I have just read them into the record. The balance of it, I think, was over the telephone.

178 Q. Did you not receive a bill from the Hartenfeld Bag Company for this transaction?

A. Yes, sir.

Q. Will you please produce that?

A. (Paper produced.)

Q. Is that paper which you hold in your hand the bill you received?

A. I don't think it is an exact copy.

(Photostatic copy identified by witness, received in evidence with omission of figures 4952-5086 and marked Plaintiff's Exhibit 11 of Sept. 26, 1919.)

Q. Do you know when those goods arrived in Atlanta?

A. That is a matter of record.

Q. Have you the record?

A. I think they arrived on——

Q. Well, consult your record and let me know if you can.

A. About Sept. 19th.

Q. Now, have you a copy of a telegram which you sent Hartenfeld Bag Company about Sept. 11, 1918?

A. Is that asked for?

Q. Yes, that is asked for. (Paper was produced.) I show you a telegram sent by the American Mills Company to the Hartenfeld Bag Company, dated Sept. 11, 1918, and I will ask you if the original of that telegram was sent by your company?

A. I think it was.

(Copy of telegram identified by witness, received in evidence and marked Plaintiffs Exhibit 12 of Sept. 26, 1919.)

179 Q. This telegram, Mr. May, states, "Have tried to get you on 'phone but seemed you don't care to talk to us. Will expect you to call us sometime today on 'phone. Wire us when you are willing to talk." Did you dictate that telegram?

A. I don't recall.

Q. Did you try to get Mr. Hartenfeld of the Hartenfeld Bag Company on the 'phone?

A. I don't recall.

Q. Do you recall sending that telegram?

A. The occasion would be that we were trying to get deliveries; we owed bags to a number of concerns which were pressing us for delivery and that was the thing that we were after.

Q. Do you recall what, if anything, you wanted to talk with him about?

A. About deliveries; we wanted to get deliveries, and adjust any complaints we had with it.

Q. Have you any particular deliveries or complaints in mind at the present time?

A. Yes, sir; deliveries and complaints both, of the Savannah Guana Company, and we wanted to adjust the matter of the Stein Bag Company and a shipment to Norway, S. C., and adjust the matter of a return shipment from Macon, Ga., and they were all pressing us, and it was very urgent for us to make deliveries, especially about September.

Q. I show you a telegram produced by your counsel, and I will ask you if you received that telegram of Sept. 12th (exhibiting telegram to witness). It reads—— Did you receive it?

A. Yes, sir.

180 (Copy of telegram identified by witness, received in evidence and marked Plaintiff's Exhibit 13 of Sept. 26, 1919

Q. This telegram reads: "Mr. May,"—it is dated Sept. 12th, to the American Mills Company, Atlanta, Ga., and "Writer absent from office several days due to unforeseen causes; cannot make delivery carload jutes except in about thirty days from date. Suggest Lovitt coming to Chicago to adjust all matters." Do you know what that "adjust all matters," referred to?

A. Yes, sir.

Q. State what it was.

A. We wanted to get deliveries and adjust the shortages and claims and take care of the bags, as he had promised several days ago to make shipment, and we had promised to deliver them on his assurance, and he couldn't make them because he was working on government business and government business came first.

Q. After receipt of that telegram did Mr. Lovitt go to Chicago?

A. I think he did.

Q. Do you know whether or not he went alone or in company with somebody else?

A. He went with Mr. Strauss.

Q. Did they adjust matters there?

(No answer.)

Q. What, if anything, do you know personally about Mr. Lovitt's and Mr. Strauss' trip to Chicago?

A. When they came back——

Q. Please state what he told you when he came back. What did they tell you when they came back from Chicago in
181 regard to interviewing Mr. Hartenfeld and what took place there?

A. They told me what Mr. Hartenfeld would do so far as deliveries were concerned?

Q. What did they say about that?
A. I don't recall exactly what they said.
Q. As near as you can recall.
A. What is your question?
Q. (Question repeated).
A. Mr. Hartenfeld assured them that he would make probable deliveries and I was satisfied.
Q. Did they tell you anything about any financial transactions between the American Mills Company and the Hartenfeld Bag Company?
A. I think whatever they did is a matter of record.
Q. I asked what they told you.
A. They arranged for deliveries.
Q. Please answer the question, what they told you about any financial transaction in Chicago between the American Mills Company and the Hartenfeld Bag Company?
A. All I recall, Mr. Rowe, is that they told me he was going to make deliveries, and I think we paid them for one shipment.
Q. What shipment was that, do you recall?
A. I think they gave him notes—you will have to give me the papers.
Q. I am willing for you to refresh your recollection in any way that you like. (Witness examines paper.)
A. They gave him two notes, dated September the 14th, one for
$4,485.08, and one for $4,650.00, the first payable January
182 5th, and the second payable Dec. 18th, to the order of the
Hartenfeld Bag Company.
Q. And executed by whom?
A. Signed by the American Mills Company, by L. G. Strauss, Secretary.
Q. Have you the notes in your hand?
A. Yes, sir.
Q. Will you let me see them please?
A. (Witness produces papers.)

(Notes produced by defendant and identified by witness, received in evidence; note for $4,485.08 marked Plaintiff's Exhibit 14 of Sept. 26, 1919, and note for $4,650.00 is marked Plaintiff's Exhibit 15 of Sept. 26, 1919.)

Q. Will you look at these American Surety Company's Exhibits, Nos. 14 and 15, of this date, and state what they were given in payment for?
A. I don't know it.
Q. Did Mr. Strauss or Mr. Lovitt, upon their return from Chicago, tell you the purpose of giving the notes?
A. No, sir.
Q. Did they tell you that they had given the notes?
A. Yes, sir.
Q. Didn't they tell you what they gave them for?
A. They said they gave the notes, but they didn't tell me what for; I mean by that, they didn't tell me what invoices; they said

they gave the notes, but I don't know if it was for invoices or shortages or whatever the case might be.

183 Q. You remember testifying before Mr. Adams last February, don't you?

A. I remember testifying.

Q. Do you remember testifying that you thought these notes were given in payment for invoice of $9,225.00?

A. I might have said I thought so, but I didn't say I knew it; there is a difference between me saying I think it, and saying that I know it.

Q. I understand your testimony is that when Mr. Strauss and Mr. Lovitt returned from Chicago, they told you that they had executed—Mr. Strauss had executed and delivered these notes—American Surety Company Exhibits 14 and 15, of this date, and that they did not tell you for what purpose or in payment of what bills these notes were given.

A. To the best of my recollection, I don't recall it.

Q. Did they tell you that the Hartenfeld Bag Company had given notes to the order of the American Mills Company?

A. Yes, sir.

Q. What did they tell you about that? Proceed, Mr. Witness.

A. What is the question?

Q. (Question read over by reporter).

A. I don't recall looking over any statement because that is Mr. Strauss' department.

Q. What do you recall about any notes brought back from Chicago of the Hartenfeld Bag Company to the order of the American Mills Company by Mr. Strauss or Mr. Lovitt on their return?

A. To the best of my recollection, when Mr. Strauss was

184 there, the settlement—I think the payment of these notes was for a balance due on some bags.

Q. Do you remember how much the notes were?

A. I don't recall exactly, but I think they were for $5,000.00 and $4,225.00, but I am not sure.

Q. I show you a statement which has been marked "American Surety Company Exhibit No. 2," for identification, on this date look at that second item and see if that refreshes your recollection.

A. That is a transposition of figures. That is the first item; I think they were mixed in the writing.

Q. I asked you if it refreshed your recollection as to the fact that the notes the Hartenfeld Bag Company gave Mr. Strauss and Mr. Lovitt on or about Sept. 14, to the order of the American Mills Company aggregated $9,035.08.

A. Aggregated $9,035.08? You will have to give me the other papers.

Q. I will be glad for you to look at them (exhibiting papers to witness.)

A. What is that question?

Q. (Question read by the reporter.)

A. The notes amounted to $9,225.00, one of them being for $5,000.00, and the other $4,225.00.

Q. What, if anything, did Mr. Strauss or Mr. Lovitt tell you that these notes of the Hartenfeld Bag Company were given for?

A. As I understand it, the amount of what allowances and deductions that Mr. Strauss arranged for included 50,000 bags at 2c a bag, and an allowance on a shipment to the Courteen Seed
185 Company, and the difference on some inside coffee bags that were still to be shipped, amounting to a total of—I will have to get the figures (examining papers)—a claim, a railroad claim of $925.00 freight $785.58, $2,818.01 being a balance on the Stein Bag Company's shipment and $9,225.00, making a total of $13,753.59; he then gave Mr. Strauss a check for $2,726.41, making a total of $16,480.00.

Q. Was that the amount of your claim against the bag company at that time?

A. What do you mean by claims?

Q. I think it is perfectly plain—the amount they owed you.

(No answer.)

Q. Was that the amount of your claim at that time against the Hartenfeld Bag Company for merchandise undelivered?

A. I cannot answer that, because I am not acquainted with these figures.

Q. You have examined a memorandum of some kind; will you let me look at that, please?

A. Yes, sir. (Handing paper to counsel.)

Q. Do you know who prepared this paper that you have used to refresh your recollection? Answer the question?

A. I suppose it was produced by Hartenfeld, it is on their paper.

Q. It was brought back from Chicago by Mr. Lovitt, or Mr. Strauss?

A. I think so.

Q. It now appears that the Hartenfeld Bag Company gave notes to the American Mills Company at this time, aggregating $9,225.00, and the American Mills Company gave notes to the Harten-
186 feld Bag Company aggregating $9,135.80; did Mr. Strauss or Mr. Lovitt, upon their return from Chicago, tell you why the notes were exchanged? Go on.

A. I don't know of any exchange.

Q. Did they tell you—that is, Mr. Lovitt or Mr. Strauss, why they gave the notes of the American Mills Company, aggregating $9,135.08, at a time when the Hartenfeld Bag Company owed the American Mills Company a larger sum?

A. I don't know, sir.

Q. You don't know if they told you or not?

A. I don't recall.

Q. You have no recollection of Mr. Strauss or Mr. Lovitt telling you, upon their return from Chicago, why they executed and delivered to the Hartenfeld Bag Company the notes of the American Mills Company for $9,135.08, at a time when from the Hartenfeld Bag Company was due the American Mills Company a larger amount?

A. I don't know that the Bag Company was indebted to the

American Mills Company for a larger amount; it was a shipment for $9,225.00 on August 29th and they gave Mr. Strauss a check for $2,700.

Q. And you gave notes for $9,225.00?

A. I can't answer that question; Mr. Strauss knows.

Q. I asked you if they told you why they gave these notes under those circumstances?

A. I don't recall that.

Q. What is your best recollection?

A. I don't recall.

Q. It is your best recollection at the present time that you have no recollection of Mr. Strauss or Mr. Lovitt telling you,

187 upon their return from Chicago, why they gave notes of the American Mills Company, aggregating $9,135.08, when the Hartenfeld Bag Company was indebted to the American Mills Company in a larger amount.

A. I don't know that they were indebted for a larger amount.

Q. That is the best answer that you can make?

A. Yes, sir.

Q. I show you a photostatic copy of a telegram signed by the American Mills Company to the Hartenfeld Bag Company, Aug. 23d, 1918, and I will ask you if you recall sending that telegram?

A. I think that telegram is already in.

Q. I beg your pardon; I have the wrong one. I show you what purports to be a photostatic copy of a telegram, dated Sept. 24, at Atlanta, 10.48 A. M., and sent to the Hartenfeld Bag Company?

A. Yes, sir; that is it.

(Copy of telegram identified by witness, received in evidence and marked Plaintiff's Exhibit 16 of Sept. 26, 1919.)

Q. I also show you what purports to be a photostatic copy of a telegram, dated Atlanta, Ga., Sept. 24th, 1910, 11.58 A. M., addressed to E. J. Hartenfeld, and signed apparently Armand May; did you send the original of that telegram to Mr. Hartenfeld about the time it bears date?

A. Yes, sir.

188 (Copy of telegram identified by witness, received in evidence and marked Plaintiff's Exhibit 17 of Sept. 26, 1919.)

Q. I call your attention to the fact that the first of these Exhibits—that is Exhibit No. 16, which is dated 10.48, A. M., and the second one, reading: "Arrive La Salle seven Wednesday night. Meet me without fail. Wire agreeable." This is dated 11.58 A. M.

A. All right.

Q. And I will ask you what occurred between 10.48 and 11.58 which led to the sending of the second telegram—that is, Exhibit No. 17?

A. What occurred?

Q. Yes?

A. I have a poor memory; you have me there; I don't know what you mean.

Q. What, if anything, took place to induce you to send the second telegram—Surety Company Exhibit No. 17—answer that question. What, if anything, occurred between the sending of these two telegrams, that induced you to send the second telegram?

A. I couldn't tell you; this might be marked 10.48 and might have stayed in the office five hours; Mr. Lovitt might have sent this, Exhibit No. 16.

Q. What was the occasion of your sending the telegram signed Armand May, Exhibit No. 17?

A. I imagine I wanted to ask about getting deliveries of goods that he owed us and also wanted to ask him about the Commercial Credit.

Q. You received on the morning of Sept. 24th a notice
189 from the Commercial Credit Company of Baltimore?

A. That is a matter of record.

Q. Won't you see and find out?

A. Yes, sir; I received a telegram or a night letter, from the Commercial Credit Company.

Q. When did you receive that?

A. It is stamped on it, ain't it? That is just a confirmation.

Q. Have you got the telegram?

A. I got a registered letter and that was received Sept. 24th, I can't tell you the hour. I received a telegram from the Commercial Credit Company, but I couldn't tell you when it was received in the office.

Q. When was it received in Atlanta?

A. 11.05 A. M.

Mr. Rowe: It is from the Commercial Credit Company addressed to the American Mills Company: "Hartenfeld Bag Company of Chicago sold us for a valuable consideration invoice of August twenty-nine nine thousand two hundred and twenty-five dollars for merchandise sold and shipped to you stop these invoices to be settled with us direct stop formal notices being mailed to you today." Signed Commercial Credit Company.

Q. Now did you receive anything else from the Commercial Credit Company about that time?

A. No, sir; I received on the 25th a registered letter from them.

190 Q. Have you the contents of that registered letter and the enclosure?

A. I haven't read it; it is simply a notice; it is a long instrument——

Q. I don't want you to read it, but I have a copy here, and I can use that as well as the original, if it is the same. Now, when was the notice you have produced——

(Paper produced by witness, received in evidence and marked Plaintiff's Exhibit 18 of Sept. 26, 1919.)

How did you receive that notice, Exhibit No. 18?

A. That came as a registered letter, and was received in Atlanta on September 25th. I cannot tell you when I signed for it, whether it was the 25th, 26th, or 27th, but I received it.

Q. I show you what purports to be a copy of a telegram dated Sept. 25th, 1918, addressed to Armand May, c/o the American Mills Company, reading: "Will meet you at La Salle Hotel." Did you get that?

A. Yes, sir.

(Paper produced by witness received in evidence and marked Plaintiff's Exhibit 19 of Sept. 26, 1919.)

Q. What did you next do after the exchange of these telegrams and receiving that notice?

A. I went to Chicago.

Q. What time did you get there?

A. I got there on the night of the 25th.

Hearing adjourned to Sept. 27, 1919. On September 27, 1919, the examination proceeded pursuant to adjournment.

191 Q. I show you photostatic copy of a letter on the letterhead of the American Mills Company, addressed to the Hartenfeld Bag Company of Chicago, dated 9-23-18, with a couple of enclosures; look at that and state whether you ever saw the original of that letter?

A. Yes, sir.

Paper identified by witness, received in evidence and marked Plaintiff's Exhibit 19a of Sept. 27, 1919.

Q. Look at that and see if that refreshes your recollection as to the fact that these two notes of the American Mills Company, given to the Hartenfeld Bag Company on Sept. 14, and amounting to $9,135.08 were given in payment of invoice of Aug. 29, 1918?

A. You will have to ask somebody that knows. Mr. Strauss knows about that, he was there at the time.

Q. That is the best answer that you can make?

Y. Yes, sir.

Q. At the time these notes were given by Mr. Strauss on Sept. 14th, aggregating $9,135.08, did the American Mills Company owe the bag company any money?

A. Ask that again.

Q. (Question repeated by the reporter.)

A. Did the American Mills Company owe the bag company? I imagine they owed some money for freights and part shipments of the Stein Bag Company.

192 Q. Have you any idea of how much that was, approximately?

A. (Continuing:) And a railroad claim of $925.00, and the freight was about $725.00.

Q. The balance was $975.00?

A. No, sir; this $925.00 is the railroad claim. The freight items were $785.50, and B. & O. claim was $925.00. What date?

Q. About Sept. 14th?

A. Sept. 14th? On August 29th, and the shipment they made to us of fifty meals and 10,000 lbs. of burlap——

Q. All that I am interested in is what you owed them about Sept. 14th, or prior to that, take, for instance, Sept. 13th; you have given us the freight and the B. & O. claim.

A. We didn't include the shortage and other items he had until Sept. 20th; I had made, when I was in Chicago, in August, I had given him until Sept. 20th, if I am not mistaken, to fill this shortage, they were still due, and also the balance of the bags that weren't shipped.

Q. The American Mills Company did owe the Hartenfeld Bag Company of Chicago for them, didn't they—I am asking you what the American Mills Company owed to the Hartenfeld Bag Company.

A. We owed them at that time the items that I have enumerated.

Q. Now, prior to Sept. 14th—say Sept. 13th, had the American Mills Company bought any merchandise that had not been paid for in advance either by note or cash except invoice of August 29th, amounting to $9,225.00?

A. Yes, sir. We had bought some bags, a carload of bags, that were to be shipped to Baltimore, a carload of jutes, and several other items, I don't recall now which, but several other items. That carload of bags amounted to about 30,000 bags, I think, and it must have been 25c. apiece, that would be $7,500, and they owed us—I don't know what other shipments followed.

Q. Do you understand what I asked you? Did you, prior to Sept. 14th—that is to say, Sept. 13th, purchase any goods from the Hartenfeld Bag Company that had not been paid for by you, either by cash in advance or notes in advance, except the invoice of August 29th, amounting to $9,225.00?

A. You must remember, Mr. Rowe, that our business is not a one-man business. I don't look after all of it; we have several looking after it; I can't answer that, but I give you my best recollection, and that it all.

Q. What is your best recollection?

A. I have already stated my best recollection.

Q. That there was merchandise you purchased and had not paid for by notes or cash, in addition to the invoice of August 29th, amounting to $9,225.00?

A. Yes, sir.

Q. You said that after the exchange of telegrams of Sept. 24th, between Mr. Hartenfeld and yourself you went to Chicago. Go on and answer the question.

A. I don't know if the telegram you refer to was sent prior to or after. A telegram could leave Atlanta, say, at ten o'clock and another could leave at twelve o'clock and the twelve o'clock telegram could be delivered first and the ten o'clock telegram could be delivered second.

Q. After you sent the telegram, marked Exhibit #17, what did you do?

A. Let me see that other one.

Q. Just answer the question?
A. What did I do?
Q. Yes.
A. I presume I arranged to go to Chicago.
Q. After you made those arrangements, did you go to Chicago?
A. Yes, sir.
Q. When did you go to Chicago?
A. I got to Chicago on the night of the 25th.
Q. Did you see Mr. Hartenfeld that night?
A. No, sir, I wired him that I would arrive at the La Salle Hotel at seven o'clock Wednesday night and to meet me, and he didn't meet me; he left a message saying that he would see me the next morning, and I saw him the next morning.
Q. That was September 26th?
A. That would be September 26th.
Q. Where did you see him?
A. I saw him at the office of the St. Clair Mining and Milling Company, I think, in an office building, I think, but I don't know the name of the building.
Q. If I were to say that it was the Kimball Building would that refresh your recollection?
A. I think it was the Kimball Building.
Q. What time of day did you see him?
A. I think about ten o'clock in the morning.
Q. And who was present at the interview?
A. Nobody was present at the interview.
195 Q. Please tell us what took place, what you told him and what he told you?
A. I saw Mr. Hartenfeld and took up with him two subjects; I took up the question of the notice we had received from the Commercial Credit Company——
Q. What did you say about that?
A. We took up the question of the Commercial Credit Company, and I asked him about it because it was a very unusual transaction and I didn't understand it, and Mr. Hartenfeld explained it to me that it was a mistake of his bookkeeper, Mr. Simon, and that it was a pure bonehead mistake, and that he couldn't account for it. I talked to him about it and he insisted that it was a mistake, and I went further into the question and asked him how he could allow such a thing to happen, and he insisted that it was a mistake of Mr. Simon, and I then saw Mr. Simon and he said it was a mistake, and after we got through talking about the credit company's business, he said that he was al- right and that he was long on merchandise, but there was a little shortage in cash, but that in about sixty days' time, he would have more money than he would know what to do with, and I don't remember just the exact words, but he suggested that if I had any apprehension about him, that he would suggest that we make—that we cancel out all the balance of the contracts that he was short on and that we make a new contract with him, and that I would purchase a certain amount of bags from him for cash, and

that he would then pay up what he owed us and make a
196 fresh start. I never at any time, when I got there, asked him for any money.

Q. Have you told us everything that took place at that interview?

A. I can't say that I have told you everything.

Q. Will you please state everything of which you have any recollection?

A. I told him that if he would get me some good surety bond, that I would be willing to take that. He told me further that he had secured several surety bonds, and that is the way he had handled a transaction with a concern in New York. I don't recall the name, and we prepared a contract which I think was the same as he had had in previous transactions with the American Surety Company, but I am not sure, and after he had done that, I took the contract to my lawyer and had him approve it, and after he made some changes, I took it back to Mr. Hartenfeld and I presume he turned it over to the American Surety Company, and the next day—on the 28th, that is, he advised me that the American Surety Company had issued a bond and I came back to Atlanta.

Q. Now, have you told us everything that occurred on that first day when the meeting took place on Sept. 26th, 1918?

A. I think that was about all, unless you have something else in mind.

Q. I want your recollection at the present time?

A. I am giving you my recollection. I know I got there in the morning and he was quite busy, and he was telling me about how much money was coming in on the sale of stock of this mine and how much he would have in a short time.

197 Q. You left Chicago to return on the 28th, you say?

A. Yes, sir.

Q. Did you have this interview with Mr. Hartenfeld the day before you left or two days before you left?

A. He said that he would get a bond, and I think it was about a day before he got it, and I never saw him for a day, and I think I called him on the phone and he said he hadn't heard from the bond, that they had telegraphed to New York, I think he said.

Q. Did you take the telegram that you had received from the Commercial Credit Company to Chicago with you?

A. I don't recall whether I did or not. I don't see any reason why it would be so material.

Q. You have answered that you do not recall, and I asked that the balance of the answer be stricken out. At that time, how much did the Hartenfeld Bag Company owe the American Mills Company—Sept. 26th or 27th, 1918?

A. About $12,000.

Q. Did you have any security at that time for that indebtedness?

A. No, sir; we didn't have any security for that indebtedness other than the fact that we had bought bags and had paid for them, which was our property, and he said he had the bags and that they were waiting to finish up some government orders and that as soon as they finished up the government orders he would straighten out our bags.

Q. Beside that, you had no other security at that time?
A. No, sir.
198 Q. Can you recall any better what you said to Mr. Hartenfeld, and what he said to you when you told him you had received this notice from the Commercial Credit Company?
A. I cannot recall any more than I have already told you.
Q. Did you state to Mr. Hartenfeld that it was a very peculiar thing that they had assigned this account to the Commercial Credit Company of Baltimore and on Sept. 14th thereafter took notes from Mr. Levitt and Mr. Strauss of the American Mills Company, aggregating $9,135.08, in payment of the same invoices?
A. No, sir; I didn't tell him it was a peculiar thing.
Q. Did you state that to him in substance?
A. I don't think so. I am pretty sure that what I said was: "How did you make the mistake?" He knew it was a serious mistake.
Q. How do you know he realized it was a serious mistake?
A. I imagine he is enough of a business man to realize if he had wrongfully sold our account and took our money wrongfully and sold it to somebody else; he must have realized it.
Q. Did he express himself about it?
A. He said that he would adjust it and straighten it out and that I needn't worry.
Q. Did you tell him, in substance, that the Hartenfeld Bag Company must be in a bad way financially or wouldn't have done such a thing?
A. No, sir.
Q. Did you ask him anything about the financial condition of the Hartenfeld Bag Company?
199 A. He said the Hartenfeld Bag Company was in good shape.
Q. Won't you please answer the question; did you ask him anything about the financial condition of the Hartenfeld Bag Company?
A. I don't recall asking him.
Q. You have no recollection of asking him anything about the financial condition of the Hartenfeld Bag Company, is that your answer?
A. I don't recall asking him——
Q. Please answer the question.
A. Mr. Hartenfeld had told me before that he was long on merchandise and short in cash.
Q. When did he tell you that?
A. When did he tell me that?
Q. Yes.
A. On my trip on — August—what is the day I got there?
Q. I don't know, you will have to testify to that yourself.
A. August 26th, no, Sept. 26th.
Q. Was that in response to any inquiry on your part?
A. When I asked him about the mistake.
Q. What did he say?
A. He said that it was a pure bone-headed error and that Mr.

Simon made it, and I asked him how he could make it, and he said he didn't know, but that it was an error just the same.

Q. Did you ask him what became of the two notes aggregating $9,135.08 that Mr. Strauss and Mr. Lovitt had given him on Sept. 14th, 1918?

A. I don't know if I did or not, but I knew about this discount.

Q. Did you know about where they were discounted?

A. At Foreman Brothers.

200 Q. Did you ask Mr. Hartenfeld to clear up the matter with the Commercial Credit Company of Baltimore?

A. It wasn't up to me to ask him.

Q. I asked you if you did ask him to clear up the matter with the Commercial Credit Company of Baltimore?

A. No, sir. I didn't ask him to clear it up.

Q. Did you tell him what the attitude of the American Mills Company would be toward the Commercial Credit Company of Baltimore on that assigned account?

A. It wasn't necessary, he said he would straighten it out.

Q. Did you tell him that the American Mills Company would not pay to the Commercial Credit Company the amount of this assigned account, $9,225.00, unless some adjustment was made between the Hartenfeld Bag Company and the American Mills Company?

A. I never would have told him that I would settle that $9,225.00, because I would only pay the value of the merchandise. If that car had been right according to specifications, I would have paid it. I told him at that time that we had received the car and that upon minor inspection, it looked like the thing was wrong, and I put him on notice that when we settled for that car we were going to pay for it on the basis of what it was worth.

Q. Did you tell him that you would not settle for that car on the basis on which it was put or any other basis until the matter was adjusted between you and Hartenfeld?

A. Mr. Rowe, I don't understand that because a man assigns an account that don't mean that I have to pay it.

201 Q. Won't you please answer the question?

A. Ask it again.

Q. (Question read over.)

A. I didn't tell him that I wouldn't settle——

Q. Please answer the question?

A. I did not.

Q. Did you ask Mr. Hartenfeld for a settlement of your account?

A. I asked him about the Commercial Credit Company's business and also about the balance due us on our contract and also about the balance of the settlement we had made with him that was to be executed by Sept. 20th.

Q. Did you ask him for payment of that account?

A. No, sir.

Q. Did you ask him for any security for that account?

A. He offered——

Q. Please answer the question?

A. No, sir.

Q. Did you ask him for any deed to any real estate securing this account?

A. No, sir.

Q. Did you ask him for any mortgage upon real estate to secure that account?

A. No, sir.

Q. Did you ask for any notes?

A. No, sir.

Q. Did he offer to deliver to you—that is, to the American Mills Company, merchandise at prices to be agreed upon in ninety days thereafter, delivery to be secured by a surety bond, satisfactory to you, in settlement of the account you had against the Hartenfeld Bag Company?

A. I answered that question before.

Q. Now answer it again, please?

A. Mr. Hartenfeld told me that he wanted to make a new start fresh again, and that if I would buy for cash a certain
202 amount of goods, that would dispose of it and he would then pay me what I claimed for shortages and allowances, etc.

Q. Is that all he said on the subject?

A. I told him that if he would get me a surety bond from a good company, that that would be agreeable, and when he got the surety bond——

Q. I call your attention to the testimony given before Mr. Adams last February in the proceedings in bankruptcy of the Hartenfeld Bag Company, in which you stated as follows:—Mr. Conyers asked you:

"The bags you were going to buy? You went up there to make a settlement of what he owed you?

A. We went up there and we were to take bags for this account.

Q. He was to ship you bags in payment and he wanted to satisfy you that he would ship them. Wanted to guarantee you that he would ship them. He said that he would guarantee that he could do it, that he would do it?

A. Yes, sir; and if I had the least doubt about his capacity for getting those bags that he would give me security."

Do you remember testifying that?

A. What I have said is practically the same thing. You asked me: "Did you ask him for this account?" And I said that no money was offered, but I said he offered us a bond.

Q. I have asked you several times if he offered to ship you bags in payment of indebtedness; won't you please answer that question?

(The question was read over by the reporter.)

A. The contract that we made with Mr. Hartenfeld——

Q. Won't you please answer the question?

A. I can't answer the question.

203 Q. You mean that you are unable to state at the present time if Mr. Hartenfeld on Sept 26th or 27th, 1918, offered to deliver bags at a future date, say ninety days thereafter, and so-

cured by a surety company bond, satisfactory to you in payment of the amount of the claim that your company had against his company?

A. We entered into a bond——

Q. Won't you please answer the question?

A. You said ninety days.

Q. Well, call it seventy-five days?

A. As a matter of fact, he put it sixty, and I said: "I want to help you make it seventy-five, so you won't fall down."

Q. Did he offer to deliver to the American Mills Company on behalf of the Hartenfeld Bag Company, in seventy-five days thereafter, merchandise at prices to be agreed upon between you, in payment of the indebtedness that you claim against the Hartenfeld Bag Company?

A. I can't answer that question; if you want me to tell you something that you would like——

Q. I don't want you to tell me anything except what took place——

Mr. Moses: Answer the question; did he offer to ship you merchandise in payment of the overdue account; that is the question.

(The Witness:) Mr. Rowe——

Q. Can't you understand a question that has been put to
204 you by your own counsel?

A. I didn't take it——

Q. Won't you please answer the question that your own counsel has put to you?

A. I will have to answer that no.

Q. I call your attention to the testimony that you gave before Mr. Adams last February in which you said: "We went up there and we were to take bags for this account."—I ask you if you so testified?

A. Let me see that.

Q. I call your attention to the testimony on page 21—do you recall testifying before Mr. Adams, last February, in the bankruptcy proceedings of the Hartenfeld Bag Company, as follows: "The bags you were going to buy? You went up there to make a settlement of what he owed you,"—Do you remember being asked the following question: "The bags you were going to buy? You went up there to make a settlement of what he owed you?" And you answered: "We went up there and we were to take bags for this account." And, "He was to ship you bags in payment and he wanted to satisfy you that he would ship them. He wanted to guarantee you that he would ship them. He said he would guarantee that he could do it, and that he would do it." A. Yes, sir; and if I had the least doubt about his capacity for getting these bags, that he would give me security." Do you recall being asked this question and having so testified?

A. Yes, sir.

Q. Was that testimony true at that time?

A. Mr. Rowe, that testimony would be true, but if you
205 pick out one question out of a long list——

Q. I asked you if that testimony was true at that time?

A. That is the same thing I told you before.

Q. I asked you if that is the answer you then made.—Well does that refresh your recollection, that you were to take merchandise in payment of your claim, secured by a surety bond?

A. No, sir.

Q. When you went to Chicago, did you go there to buy bags?

A. I went to Chicago with reference to the Commercial Credit Company and about getting deliveries on bags and with reference to the adjustment of some shortages and replacements that were to take place before Sept. 20th, under an agreement that I made with him in the early part of August.

Q. Did you go there to get your account paid?

A. Mr. Hartenfeld——

Q. Won't you please answer the question?

A. No, sir; I went there to get the bags, as I said.

Q. Did you go there to buy bags?

A. I bought them——

Q. Did you go there to buy bags?

A. When I went to Chicago—I got a telegram and went to see about the Commercial Credit Company and about getting balance due us on bags and shortages.

Q. And that amounted to about $12,000.00?

A. Yes, sir.

Q. And that is all you went to see him about?

A. That is all that I went for.

206 Q. Was that the purpose of your going?

A. Yes, sir.

Q. To straighten out the account, when you received this notice of the assignment, and also to straighten out the items that he owed you, amounting to about $12,000.00 for non-delivery or shortages?—State it over again.

A. All right. I went up there in reference to the Commercial Credit Company's notice that we had received and about deliveries on the balance due us and also about some shortages and replacements that should have taken place before Sept. 20th.

Q. In addition to that, did you go there to buy other bags?

A. I did not go there to buy other bags.

Q. You say that the contract was prepared by Mr. Hartenfeld in your presence at his office in the Kimball Building Sept. 26th, or 27th to put into effect the agreement that you made, was that right?

A. Yes, sir.

Q. Was that in writing?

A. Was what in writing?

Q. This contract?

A. The original contract for the purchase of bags was in writing and was submitted to my counsel.

Q. Have you got your copy of the draft?

A. I think you asked for it in the subpœna, didn't you?

Q. Yes.

A. Which one?

Q. The first one you had.

A. I have answered it.

Q. Will you please produce it? (Paper produced) I show you a paper that has been produced by your counsel and ask if that
207 is the first draft that was made of the contract between the Hartenfeld Bag Company and the American Mills Company, in Chicago on Sept. 27th, 1918?

A. To the best of my knowledge it is.

Q. Who prepared that? (Paper marked for identification American Surety Company's Exhibit No. 20.)—I am asking about the first one; please state who prepared it, confining yourself first to the typewritten portion?

A. It was prepared by Mr. Hartenfeld and I might have gone over the amounts, but the wording is Mr. Hartenfeld's.

Q. Did he dictate it to the stenographer?

A. I don't recall if he dictated it to her or had her copy it; that is a contract similar to one entered into with another concern.

Q. Was that in your presence?

A. I don't recall but I don't think so, because I was in his office and his stenographer was outside.

Q. Subsequently that paper with the typewriting appearing thereon was presented to you?

A. Yes, sir.

Q. I notice on this paper some pencil writing.

A. Yes, sir.

Q. Whose is that?

A. That is the writing of my counsel.

Q. And it was not on the paper when you received it from Mr. Hartenfeld?

A. No, sir.

Q. After receiving that paper what did you do with it?

A. I took it to my counsel and asked him to look at it and see if it was all right.

208 Q. Did he make these additions and changes that appear on it?

A. Yes, sir.

Q. What did you do with it then?

A. After it was rewritten with those pencil marks——

Q. After your counsel made these changes?

A. I took it back to Mr. Hartenfeld and told him that was the way I wanted it written.

Q. What did he say?

A. I don't recall what he said, but he had it written and it was in our bond.

Paper produced and identified by witness, received in evidence and marked Plaintiff's Exhibit 20 of Sept. 27, 1919.

Q. You say the contract was re-written?

A. Yes, sir.

Q. Have you the copy or the original as it was re-written?

A. I haven't got a copy. I have the original bond.

Q. Have you the original contract?

A. Yes, sir; I have that attached to the bond.
Q. Will you produce that?
A. (Paper produced.)

Documents produced and identified by witness received in evidence and marked Plaintiff's Exhibit 21 of September 27, 1919.

Q. Do you recall, Mr. May, on Sept. 27th, 1918, sending a telegram from Chicago to the American Mills Company, at Atlanta?
A. I think you asked for that.
Q. I asked for that?
A. Yes, sir.
Q. Will you please produce that?
A. I haven't got the original.
209 Q. The one that was received by your company?
A. I haven't got that.
Q. Have you got a copy?
A. I have a copy; I think it is a copy.
Q. I show you this paper and I will ask you if that is a copy of the telegram (exhibiting paper to witness).
A. Yes, sir.

Paper produced and identified by witness, received in evidence and marked Plaintiff's Ex. 22 of September 27, 1919 reading as follows:

Sept. 27th, 1918.

American Mills Company, Atlanta, Ga.:

Nothing accomplished as yet; will wire you late to-day or tomorrow definitely and hold commercial reply.

ARMAND MAY.

Paid.
Hymkt. 6543.
Hartenfeld Bag Company, 312 N. Carpenter Street.

Q. I call your attention to that telegram, Mr. May, and I will ask you what those words, "Hold Commercial Reply," mean?
A. Mr. Hartenfeld explained the error that if I would buy merchandise from him, we could then take care of this commercial car—now let's get that straight.
Q. All right, I want you to get it straight.
210 A. Would take care of the notes that we had given him—say that again.
Q. (Question read over to the witness).
A. At that time——
Q. What does that refer to?
A. I told him to hold the reply that we were to send to the Commercial Credit Company.
Q. Had you prepared a reply to the Commercial Credit Company?
A. No, sir.
Q. Why did you telegraph your people in Atlanta to hold it if you had not prepared one?
A. I had not prepared one, and I did not want them to reply.

Q. Would they reply in your absence?
A. They might but I wanted to take proper precaution and that was just a matter of precaution.
Q. These words, "Hold commercial reply," don't refer to anything, do they?
A. They quoted the whole commercial letter, I think that refers to something.
Q. What?
A. I wired them to hold that reply, and I meant they were not to reply to that letter.
Q. Had you given any instructions as to what reply to make to the letter?
A. No, sir.
Q. Did you tell Mr. Hartenfeld that you had prepared a reply to the Commercial Credit Company?
A. No, sir.
Q. Did you tell him that you had prepared a reply to the Commercial Credit Company to the effect that the American Mills Company had already paid for the assigned account?
A. No, sir.
211 Q. And that unless some satisfactory arrangement was made for the securing of your account you would forward that reply to the Commercial Credit Company—please answer that question?
A. No, sir.
Q. Your best explanation of these words, "Hold commercial reply," is that they were sent in an anticipation or apprehension of the fact that the officers of the American Mills Company in Atlanta would make some reply to the communication from the Commercial Credit Company without your consent and approbation? Please answer the question.
A. No, sir.
Q. What explanation have you to make of it?
A. I wired them to hold the reply; I didn't want them to reply to any messages they had received or might receive.
Q. And without any knowledge or intimation of the fact that they intended to reply?
A. I thought I would take the proper precaution.
Q. Won't you please answer that question?

(Question read over to the witness.)

A. I didn't expect them to reply.
Q. It was simply a superabundance of caution?
A. It was a precaution, because I didn't know if they would get another telegram and I didn't want them to reply again.
Q. You are general manager of the American Mills Company, in addition to being president, are you not?
A. Yes, sir.
Q. Please tell us what arrangement you finally concluded with the Hartenfeld Bag Company in regard to this account that had been assigned to the Commercial Credit Company?

212 A. After I had been to Chicago?

Q. No. Let's have what you did, if anything took place at the time—Sept. 26th or 27th, 1918.

A. After we put up the money on the bond, we then——

Q. Won't you please answer the question—what discussion did you have up there about the Commercial account after he explained to you that it was a bone-head error?

A. When they made the adjustment, we were to pay the value of the merchandise, whatever it was.

Q. And you agreed when you made satisfactory adjustments with Mr. Hartenfeld, that you would settle with the Commercial Credit Company for the same value as if no notes had been given by Mr. Strauss and Mr. Lovitt?

A. Yes, sir.

Q. You would ignore the transaction and the giving of the notes?

A. Yes, sir.

Q. And you would settle with the Commercial Credit Company as if the notes had not been given?

A. At the value of the merchandise, provided the merchandise had been as ordered; there would be no question about the value, because we were to pay it, but when it was not as ordered, we had the right to reject it.

Q. You arranged with him that when they made a satisfactory settlement of the account, you would settle with the Commercial Credit Company for the same value as if the notes which Mr. Lovitt and Mr. Strauss gave had not been given?

A. Yes, sir.

213 Q. The amount of these notes should be added to the amount if the settlement should be made?

A. I don't understand the question.

Q. (Question read by reporter to the witness.) I am perfectly willing to make it as clear as I can. You said that your claim against the Hartenfeld Bag Company was about $12,000?

A. Yes, sir.

Q. And that if settlement could be adjusted with Mr. Hartenfeld satisfactory to you, that you would settle with the people in Baltimore as if the notes that Mr. Lovitt and Mr. Strauss had given had not been given?

A. That Mr. Lovitt and Mr. Strauss had given their notes.

Q. (Question read by the reporter.) On that basis, approximately how much would the Hartenfeld Bag Company owe the American Mills Company—you settled on that basis?

A. They would owe that amount less—no, plus the value of that part.

Q. I don't think you understand the question.

Mr. Moses: He means to say that they would owe $12,000 plus the two notes given by Mr. Lovitt and Mr. Strauss on Sept. 14th.

The Witness: That is correct.

Q. The statement made by your counsel is correct?

A. Yes, sir.

Q. And that is an aggregate amount of about how much roughly?
A. About $21,000.
Q. If the settlement went through, it meant that what they would have to settle for was about $21,000?
214 A. I wouldn't say settlement; I would call it adjustment.
Q. This draft of the contract that has been produced and marked as American Surety Company Exhibit No. 20, Sept. 27th, 1919, and the contract as redrafted and executed and which is marked American Surety Company Exhibit No. 21, Sept. 27, 1919—are these the papers which were drawn up between the American Mills Company and the Hartenfeld Bag Company to express the terms of the adjustment to which you refer in your testimony?—please answer the question.
A. The contract speaks for itself.
Q. Was the paper, American Surety Company Exhibit No. 20, Sept. 27th, 1919, drawn as a preliminary draft in order to express the terms of the settlement, proposed settlement, between the Hartenfeld Bag Company and the American Mills Company, concerning which you have testified?
A. No, sir; this is a purchase——
Q. Well, you have answered the question. Will you kindly look at that American Surety Company Exhibit No. 21, which is the contract as executed, the writing executed, and dated Sept. 27, 1918, and state whether or not that paper was drawn with the intention of formulating and expressing the terms of the settlement between the Hartenfeld Bag Company and the American Mills Company concerning which you have testified?
A. No, sir.
Q. Will you please state how these papers—take first, American Surety Company Exhibit No. 20, Sept. 27th, 1919, came to be drawn or prepared?—All right, go on.
215 A. I will have to repeat the same thing I have said.
Q. You said, as I understand, that you went to Chicago to secure adjustment of the claims?
A. No, sir; I said I went up there to see about the Commercial Credit Company, and with reference to getting certain bags and adjusting certain shortages that should have been completed before Sept. 20th.
Q. And you said that you did not go there to buy bags?
A. Yes, sir.
Q. I will ask you to state, under those circumstances, why you made a contract to buy bags?
A. When I got there, Mr. Hartenfeld said, "Let's start all over again; you buy a certain amount of goods from me for cash," and I agreed to buy a certain amount from him for cash, and after I bought them, I said: "Let's get through with ours."
Q. Did he explain why you should buy them for cash?
A. I will have to repeat the same thing.
Q. All right.
A. He said; "I am long on merchandise and short on cash, and I will have more money in sixty days than I will know what to do with." You must have thought he was good.

Q. Never mind about what you thought. He told you, as I understand—he said you should buy bags from him for cash?

A. Buy them for cash, and I bought them.

Q. Did you buy bags for cash?

A. Yes, sir.

Q. Did he tell you why you should buy them for cash?

A. I bought the bags for cash—now, bear in mind, Mr. Rowe——

Q. Won't you please answer the question?

216 A. No, sir; he didn't tell me.

Q. Didn't it surprise you that a man with whom you were trying to secure an adjustment of a claim amounting to about $12,000 should suggest to you that you buy more bags for cash?

Q. Didn't it surprise you that he should suggest that you buy bags from him for cash, when you went there to secure delivery on a contract that he had previously made and on which deliveries had not been completed?

A. I didn't see anything to be surprised at; he said, "Let's cancel the other goods, and make a new arrangement; let's cancel all the bags due you and the shortages and start all over again."

Q. How would you cancel them, you weren't going to make him a present of them, were you?

A. He owed us 30,000 inside coffee bags and he said; "Let's get rid of them."

Q. Get rid of them in what way?

A. Cancel the contract and make a new start.

Q. In place of the bags that he owed you?

A. We made a new contract and cancelled them off, and I bought some others that I needed to fill our orders—in my judgment, you are not going to get this straight, because you have no right to think that this is a fraud business, and you don't see the point.

Q. He owed you about $12,000 worth of merchandise?

A. Yes, sir.

Q. And you say he said: "Let's cancel that"?

A. He owed us $12,000 worth of merchandise and said "Let's start over again."

217 Q. And you say he said: "Let's cancel all bags and claims"?

A. I don't remember if he said cancel, but he said: "Let's start again."

Q. Ain't that the substance of it?—Didn't you make a contract purchasing $22,100 worth of bags, after you had agreed with him that he should use the purchase price for paying off his debt to you?

A. No, sir.

Q. In other words, you were going to pay him——

A. You said agree.

Q. Yes, you know what that means?

A. Yes, sir.

Q. You testified that you made this contract to buy bags, marked Exhibit No. 21, as of this date, and providing that you should pay $22,100 in cash, and you expected to pay that in cash to the Hartenfeld Bag Company, without any agreement or understanding that the Hartenfeld Bag Company should turn around and pay you the

amount of your claim against them, which, with these notes, amounting to $9,135.08, amounting to approximately $21,087.20.

A. I am going to answer it.

Q. I don't want you to answer anything except the question.

A. You said did I have an agreement, and I didn't have any agreement, I had no such agreement, but that might have been implied.

Q. State in what way it was implied?

A. When I got through, when I paid him the $22,000——

Q. Before you paid him that, when you got the contract of September 27th?

218 A. I bought them for cash, and I paid the money; he understood that he was to take care of me.

Q. He was to pay your claim in cash, in other words?

A. He was to pay me the balance due on the contract for the notes that he had wrongfully discounted.

Q. And was to pay that right away?

A. He didn't tell me that he would pay it right away.

Q. He understood it?

A. I hope he did.

Q. That is what you understood?

A. When you say: "You agreed," I don't like that word.

Q. I don't want you to testify to anything except the facts. When you made that agreement—to buy the bags at $22,100, which was put in that contract, American Surety Company Exhibit No. 21, it was your understanding and you thought they understood it, that when the money was paid, he would turn around and pay you the claims amounting to about $12,000, and all notes that he had wrongfully used—$9,135.08; ain't that true?

A. No, sir; when I got through, he was to take care of the $9,125.00 that he had wrongfully discounted and adjust balance due us and the shortages were taken care of.

Q. That is about $12,000?

A. Yes, sir.

Q. He was to pay you, when you performed that other contract, after paying him the $22,000——

A. That was after we made the contract he paid me, and I considered that was a fair way, but there was no agreement.

Q. Do you distinguish between an agreement and an understanding?

A. I should say I do; in other words, I can take a contract
219 and make another, and I consider that a contract; I consider a surety bond more than a scrap of paper.

Q. So do I.

A. Well, it don't seem like it.

Q. That was the real understanding?

A. I answered the question.

Q. Let's get it straight?

A. I have it straight.

Q. I don't know if I have; it was the real understanding that you

should pay $22,100 cash as an advance payment on the bags and thereupon he should pay you your claims——

A. I didn't testify that; you want me to say something to satisfy you.

Q. I want to know what was the real understanding?

A. I was to pay him, and I don't like the idea of this fraud business, when we know that our hands are clean.

Q. What was the understanding?

A. The understanding was that we had no written agreement.

Q. Never mind about that, let's have the understanding when you made that purchase.

A. He was to take care of the notes they had wrongfully discounted and also adjust the shortages.

Q. And do it right away?

A. He did it right away, because when I left Chicago, I didn't know what he would do.

Q. This bond was delivered on September 28th?

A. Yes, sir.

Q. And you came back to Atlanta with it?

A. Yes, sir, and brought it with me.

Q. How long did this transaction in Chicago take?

A. How long did it take?

220 Q. Yes; you got your bond the morning of the 28th?

A. I don't know if it was the morning or the day of the 28th.

Q. It was Saturday, wasn't it?

A. I don't know, sir; I left the same day I got the bond, I know.

Q. You got there on the evening of the 25th?

A. Yes, sir.

Q. And were engaged in all just three days in those negotiations?

A. If the bond was delivered to me at noon, it wasn't three days. I saw Mr. Hartenfeld at ten o'clock in the morning of the 26th, and if I recall, and we talked about these matters, and about the purchase of these bags, and I took the contract to my attorney for approval, and I had to wait for him, and I brought it back and had it redrafted and it was copied and sent to your company.

Q. This here, which you say is draft, Exhibit No. 20, of this date——

A. Yes, sir.

Q. —is dated Sept. 27th?

A. Yes, sir.

Q. Did you make that the day before you got the bond?

A. Yes, sir; this contract might have been dated the 27th, and it could have been written on the 26th; you can't go by that day, the day when it was turned over to me; I saw him on the 26th and we had a discussion about purchasing these bags.

Q. Did you see him on the 27th too?

A. I don't recall; I imagine I saw him on the morning of the 27th.

Q. Now, this contract, dated Sept. 27th, and which has been marked American Surety Company Exhibit No. 21, recites a payment of $22,100 by the American Mills Company to the Hartenfeld Bag Company?

A. Yes, sir.
Q. As a matter of fact, the money paid, was not paid on that day, was it?
A. That couldn't be; the bond was dated the 28th and the contract was the 27th. No, sir.
Q. You left Chicago without having paid the money?
A. The bond was dated the 28th.
Q. When did you next go back to Chicago?
A. I left here on Oct. 1st, or 2nd—I don't remember if it was the 1st, 2nd, or 3rd of October.
Q. I show you American Surety Company Exhibit No. 2, Sept. 26th (exhibiting).
A. Yes, sir.
Q. And I will ask you if you have ever seen that paper before?
A. Yes, sir.
Q. Was it prepared by you?
A. Yes, sir.
Q. Where?
A. In Atlanta.
Q. Was that prepared before you went back to Chicago?
A. Yes, sir.
Q. That draft is the statement of account?
A. There is some error in it.
Q. Let's have it?
A. This statement should have read: "Notes of the Hartenfeld Bag Company, payable to the American Mills Company $9,225. on the second line where I have it." On the first line it ought to be: "Notes in payment of invoice of August 29th, $9,135.08," and on the second line it should be: "Notes of Hartenfeld Bag Company payable to American Mills Company $9,225."
Q. Are the other items correctly stated thereon?
A. There is an allowance——
222 Q. Answer the question.
A. Yes, sir; it is correctly stated.
Q. Did you take that paper, American Surety Company Exhibit No. 2, Sept. 26th, 1919, to Chicago with you?
A. I took it on my second trip.
Q. When you left Atlanta on Oct. 1st or 2nd, 1918?
A. Oct. 1st, 2nd, or 3rd, I don't recall which.
Q. As it was originally prepared, it did not have interlineations in the hand-writing that now appear upon it?
A. No, sir.
Q. Did you go to Chicago alone on that occasion?
A. I took my counsel.
Q. Mr. Herbert Haas?
A. Yes, sir.
Q. Did you take the check offered in evidence yesterday, American Surety Company Exhibit No. 1, Sept. 26, 1919, of the American Mills Company to the order of the Hartenfeld Bag Company for $22,100?
A. Yes, sir.

Q. When did you get to Chicago?
A. I think I got there Oct. 5th.
Q. Would it surprise you if it was Oct. 3rd?
A. It might have been, I can't say; was it Oct. 3rd? I got there Oct. 3rd.
Q. What did you do when you got there, confining yourself to the interviews at which Mr. Hartenfeld was present?
A. I handed Mr. Hartenfeld a check and told him I came there to pay it.
Q. Your check for $22,100, American Surety Company Exhibit No. 1, Sept. 26, 1919?
A. Yes, sir; and I told him I would like to go over these items.
223 Q. Yes.
A. And I went over them with him.
Q. Did you produce the paper, American Surety Company Exhibit No. 2?
A. Yes, sir.
Q. Did you show it to him?
A. Yes, sir.
Q. What, if anything, did he say about it?
A. He said that all the items were correct except 28,000 meal bags, that he would not make an allowance, that the customer was taking advantage of him and that we should reship them and that he would replace them.
Q. What did you say about it?
A. I told him that would be satisfactory.
Q. Did you make any changes or corrections on American Surety Company Exhibit No. 2?
A. I scratched out the item of $560.00 and subtracted $560 from this $21,647.20, making a net of $21,087.20.
Q. I notice thereon the following hand writing in green ink; there is a deduction of $560 and a total of $21,087.20, and also the words, "Paid $21,087.20, 10–3–18, A. May, Prest."?
A. That is in my hand writing.
Q. Where was that writing done?
A. It was done in Mr. Hartenfeld's office in the Kimball Building.
Q. Did he give you a check on that occasion?
A. Yes, sir; he wrote out a check for the amount.
Q. That was $21,087.20?
A. Yes, sir.
Q. To the order of the American Mills Company?
A. Yes, sir; I don't recall if the writing was done at Mr. Hartenfeld's or the Foreman Brothers' Banking Company.
224 Q. I show you a photographic copy of a check of the Hartenfeld Bag Company, drawn on Foreman Brothers' Banking Company, October 3rd, 1918, to the order of the American Mills Company, for $21,087.20, and I will ask you to look at that and state whether or not that is a copy of the check that Mr. Hartenfeld gave you?
A. Yes, sir; that is a copy.
Q. After you had concluded your interview at Mr. Hartenfeld's office, did you go anywhere?

A. He suggested that I go with him to the bank, and I did; we went to Foreman Brothers Banking Company.
Q. What took place there?
A. We met Mr. Neise there, Vice-President, and while Mr. Hartenfeld was getting this check for us, I asked him what he thought about Mr. Hartenfeld.
Q. Did he deposit the check you brought from Atlanta?
A. I didn't see him do it, but I imagine he did.
Q. Did you have this check that he gave you certified?
A. Yes, sir; it is certified.
Q. Was it certified at your request or his request?
A. He said, "I suppose you want it certified," and I said "Yes."
Q. And it was certified and returned to you?
A. Yes, sir.

(Copy of check identified by witness, received in evidence and marked Plaintiff's Exhibit 23 of Sept. 27, 1919.)

Q. After you had received the check that had been marked American Surety Company, Exhibit No. 23, of this date, what
225 did you do then?
A. As I said, while he was getting that, I was talking to the Vice-President.
Q. What was done thereafter?
A. I would like to complete that.
Q. Did you deliver the receipt, Exhibit No. 2, of September 26th, 1919?
A. Yes, sir.
Q. Did you have any other conversation with Mr. Hartenfeld on that occasion?
A. I think I went with him to lunch; I am not sure.
Q. And after you had lunch, what did you do; did you go back to Atlanta?
A. I went back to Atlanta; yes, sir.
Q. Have you seen Mr. Hartenfeld since?
A. No, sir.
Q. Have you a copy of the letter of Oct. 5th, to the Commercial Credit Company, Mr. Moses? (Counsel produces copy.)—I show you, Mr. Witness, a copy of letter produced by your counsel, addressed to the Commercial Credit Company, dated 10-5-18, and I will ask you if you dictated and sent such a letter?
A. Yes, sir.

(Paper identified by witness, received in evidence and marked Plaintiff's Exhibit 24, of Sept. 27, 1919.)

Q. I show you photostatic copy of letter, Mr. May, dated 10-5-18, addressed to the Hartenfeld Bag Company, Chicago, and signed by you; do you recall signing that?
A. Yes, sir.

(Photostatic copy of paper identified by witness, received in evidence and marked Plaintiff's Exhibit 25, of Sept. 27, 1919.)

226 Q. I call your attention to the language in the first sentence, Exhibit No. 25, "The writer has just returned home and taking up question of purchase of bags we made of you as of Sept. 27th; we want to call your particular attention to the purchase and guarantee of the American Surety Company." What do you mean by 'As of Sept. 27th?"

A. The contract was dated Sept. 27th, and the bond was not executed until the 28th, and final payment was not made until Oct. 3rd.

Q. I show you photostatic copy of letter of 10-8-18, addressed to the Hartenfeld Bag Company of Chicago, and apparently dictated by you, and I will ask you if you remember dictating and sending that letter?

A. Yes, sir.

(Photostatic copy of letter identified by witness, received in evidence and marked Plaintiff's Exhibit 26, of Sept. 27, 1919.)

Q. Now, have you got Mr. Hartenfeld's letter of Oct. 12th? (Letter produced.) I show you letter dated October 12, 1918, addressed to the American Mills Company and on the letterhead of the Hartenfeld Bag Company, and I will ask you if you received that on or about the date it bears date?

A. I received it probably two days later, on October 14th or 15th.

(Photostatic copy of letter identified by witness, received in evidence and marked Plaintiff's Exhibit 27, of Sept. 27, 1919.)

Q. I show you photostatic copy of letter of American Mills Company, dated 10-16-18, addressed to Hartenfeld Bag Company,
227 Chicago, Ill., and will ask if you remember dictating and sending that letter?

A. Yes, sir.

(Photostatic copy of letter identified by witness, received in evidence and marked Plaintiff's Exhibit 28, of Sept. 27, 1919.)

Q. Now, I show you office copy of letter dated Nov. 29th, 1918, addressed to Commercial Credit Company, Baltimore, Md., and signed in typewriting American Mills Company, which office copy is produced by counsel, and ask you whether that letter was sent on or about the date it bears date, to the Commercial Credit Company?

A. This letter was written by Mr. Lovitt, and I presume was sent on or about the date mentioned.

Q. Were you familiar with the contents of it at the time it was sent?

A. Yes, sir.

(Copy of letter identified by witness, received in evidence and marked Plaintiff's Exhibit 29, of Sept. 27, 1919.)

Q. Mr. May, were you familiar with the burlap situation in this country in the last of August, 1918?

A. Yes, sir.

Q. And also with the second-hand bag market?

A. Yes, sir.

Q. And you were familiar with the same markets in the latter part of November or the first of December, 1918, were you not?
A. Yes, sir.
Q. How did the prices of bags and burlap in the last part of November or the first part of December compare with the prices around the last part of August or the first part of September?
228 A. The market on burlap between September—between October 1st, when it was at the highest and Nov. 28th—there had been quite a drop in the market both of burlap and burlap bags.
Q. Can you state about how much, approximately?
A. I imagine it must have been about 25%.
Q. I call your attention, Mr. May, to your testimony before Mr. Adams last February, as follows: "If he owed you $21,087.20 on transactions that were already over with, you made, you say, a new contract with him to deliver you $22,100 worth of bags in the future? A. The contract says"—and then Mr. Conyers, who was examining you, interrupted with the question, "Q. Did you not do that?" And you answered, "Yes, sir." And then Mr. Conyers asked you: "Q. The new contract of $22,100 for future delivery of bags was separate and distinct from the $21,087.20 already owed you?" And you answered: "I did not think it was separate and distinct." And then Mr. Conyers interrupted with another question: "Q. Were you contracting for $22,100 in addition to the amount owed you?" And you answered: "A. The contract speaks for itself." You were then questioned: "Q. Were you asking for delivery of—asking for delivery of $22,100 of bags besides what he already owed you?" and you answered, "A. That cancelled the other debt." Do you remember so testifying?
229 A. If it is in the record, I think I did, but I could not—if I testified it was $22,000 I simply testified something that was not true, because he didn't owe us but $12,000.
Q. I am asking you do you remember so testifying?
A. If I testified, I testified that, but he didn't owe us but $12,000.
Q. But did you so testify?
A. I testified.
Q. You did so testify?
A. Yes, but he didn't owe us but $12,000.

Cross-examination.

Questions by Mr. Moses:

Q. Mr. May, in the year 1918 what character of merchandise did the American Mills Company purchase of the Hartenfeld Bag Company?
A. We purchased second-hand bags, burlap bags and sewed burlap, second-hand, or rather once used burlap sewed.
Q. So that we may understand that clearly: what second-hand bags have you reference to? What were they used for?
A. That we purchased?
Q. What were they used for?

A. They were used by the oil mill trade and by the fertilizer trade particularly.

Q. For what purpose?

A. For the packing of cotton seed meal and for the packing of fertilizer. When I say meal that includes meal, hulls and cake.

Q. And what was burlap used for?

A. The burlap was in great demand during that time and was used in the place of new burlap, which was very, very high, for the bailing of merchandise.

230 Q. What kind of merchandise?

A. Such as comes from cotton mills or furniture factories and the like.

Q. Was all of the character of merchandise bought by the American Mills Company from Hartenfeld Bag Company second-hand merchandise?

A. Practically all.

Q. And previous to the purchase of the bags what had these bags been used for?

A. The bags, such as inside coffee bags, had ben used for bringing coffee here from Brazil or wherever the coffee might have come from, and the meal bags had possibly been used previously for meal when they were used, and the hull bags and the cake bags in the same way.

Q. Were those bags purchased by the American Mills Company from Hartenfeld Bag Company in a clean and repaired condition or in an unclean and unrepaired condition?

A. They were all purchased in a clean and proper, supposedly guaranteed sound condition.

Q. Who was supposed to have done the cleaning?

A. The Hartenfeld Bag Company.

Q. Prior to August 1st, and immediately prior to August 1st, was the Hartenfeld Bag Company indebted to the American Mills Company for any of that character of merchandise about which you have just testified? I mean indebted in merchandise, not in money?

A. They were indebted to us for merchandise, which we were very, very anxious to secure.

231 Q. Well, you have answered my question. Had any of that merchandise, previous to August 1st or approximately that date, been sold by you to customers of American Mills Company, which you were getting or expected to get from the Hartenfeld Bag Company?

A. Yes, sir; all of it had been sold.

Q. Did you make any purchases of the Hartenfeld Bag Company of any of the character of merchandise about which you have testified previous to your having contracted yourselves to deliver the merchandise to customers?

A. As a rule we sold the merchandise and then we bought it.

Q. In other words, you would make contracts for sales before you went into the market and contracted with the Hartenfeld Bag Company to buy?

A. Yes, sir.

Q. Was it the effect of the failure of the Hartenfeld Bag Company deliver the merchandise to you which made it impossible for the merican Mills Company to execute its contracts for delivery to customers?
A. Yes, sir.
Q. Did that constitute any embarrassment upon the part of the merican Mills Company in its dealings with its trade?
A. Very seriously.
Q. Did they, immediately previous to Sept. 1st, 1918, owe the merican Mills Company for any merchandise of the character entioned to replace merchandise which the American Mills Comny had rejected?
A. Yes, sir.
Q. What had this been rejected for?
A. Well, we had made shipments from Atlanta, Ga., in which there were a number of bags that were incorrect.
Q. Incorrect in what respect?
A. They were not up to specifications.
Q. In what respect?
A. And were therefore rejected because they were not up to specitions.
Q. In what way did they not fill specifications?
A. Instead of being No. 1 inside coffee bags they were possibly 2 or No. 3.
Q. What is the difference between the No. 1, and No. 2 and No. 3, ide coffee bag?
A. A No. 1 inside coffee bag is a bright color, bright clean inside ffee, that has never been used except for coffee once before and all es have been mended; all holes known as sample holes. No. 2 a bag that is fairly bright that might have several stitches that ve been thoroughly mended.
Q. And what is No. 3?
A. No. 3 is a bag that has possibly been used for coal, discolored, ssibly has more or less holes in it.
Q. Have those grades, known as one, two and three in coffee gs, a well-defined distinction in qualities in the trade?
A. A fertilizer company can use No. 1 bags——
Q. Well, just answer my question?
A. Yes, sir.
Q. Do you recall that on or about June 24, 1918, the American ls Co. returned to Hartenfeld Bag Company seventy-six bundles bags, a total of 15,323 bags, which were to be replaced by the Hartenfeld Bag Company, and also, in addition to that, they owed you for 7,000 bags?
A. Yes, sir.
Q. Did you charge, or rather, the American Mills Company, rge the Hartenfeld Bag Company, and did Hartenfeld Bag Comny pay for the labor of packing and reshipping 15,324 bags?
A. I think they did.
Q. Previously thereto had the Hartenfeld Bag Company shipped, your order, to Stein Bag Company of Atlanta, some merchandise?

A. Yes, sir; those bags were shipped——
Q. Well, just answer my question?
A. Yes, sir.
Q. Was any of that merchandise referred to refused and rejected by the Stein Bag Company?
A. Yes, sir.
Q. What for?
A. Not up to specifications.
Q. And did the Hartenfeld Bag Company accept a return of the merchandise from the Stein Bag Company because of the rejections?
A. Yes, sir.
Q. Did they subsequently supply to the Stein Bag Company, or to the American Mills Company, bags to replace those that had been rejected?
A. Yes, sir.
Q. Up to what date did they do that?
A. I don't recall the date.
Q. Well, had they prior to Sept. 1st?
A. Prior to Sept. 1st I don't think so.
Q. Were they owing for those bags on Sept. 14th, 1918?
A. Yes, sir; they were owing for the shortage.
234 Q. That is what I mean.
A. Yes, sir.
Q. The Hartenfeld Bag Company paid the American Mills Company, did it not, $111.27 for the return of merchandise of Stein Bag Company and for the freight charges?
A. Yes, sir.
Q. On July 3rd the Hartenfeld Bag Company was indebted to the American Mills Company, was it not?
A. Yes, sir.
Q. For shortages of merchandise?
A. Yes, sir.
Q. Did the Hartenfeld Bag Company write the American Mills Company with reference thereto?
A. Yes, sir.
Q. I show you a letter dated July 3, 1918, signed by Hartenfeld Bag Company, and ask you whether that letter was received by American Mills Company from Hartenfeld Bag Company?
A. Yes, sir.
Q. It was in response to that letter, was it not, that Complainant's Exhibit No. 5, of Sept. 26th, 1919, was sent—all right, American Surety Company, instead of Complainant's?
A. Yes, sir.
Q. On the day that the letter, American Surety Company Exhibit No. 7, of Sept. 26, 1919, was sent by American Mills Company, was any other communication or communications sent to Mr. Hartenfeld?
A. We sent him a telegram under date of July 18th.
Q. What was said in that telegram?

A. We wired E. J. Hartenfeld, c/o Hartenfeld Bag Company, 312 N. Carpenter Street, Chicago, Ill:

235 "Wire if fifteen thousand insides shipped also Stein and Macon replaced insides shipped."

(Signed) "AMERICAN MILLS CO."

Q. Was there anything said other than that to E. J. Hartenfeld, or the Hartenfeld Bag Company on the same day?

A. That was followed up by a letter of the same date, July 18th, to E. J. Hartenfeld, % Hartenfeld Bag Company, 312 N. Carpenter Street:

"DEAR SIR:

We have just wired you the following: 'Wire if fifteen thousand insides shopped also Stein and Macon replaced insides shipped.'

It is all very well for us to take care of these notes of yours, but if we are going to take care of them, and placed to this inconvenience, we have got to know that you are doing something and that we are not carrying the entire load.

Please keep in mind one thing, that we have been accepting the statements which you have been making on the basis of one hundred per cent on the dollar, and since we have been accepting them on that basis, there is no reason why we should not expect you to make good.

I might state to you that there are very few concerns who would have handled this matter in the way we have handled it, but
236 we have always treated with you liberally and we do not want to change, but we want to see some appreciation shown, and by appreciation we mean seeing that the goods go out and the quality is as it should be.

We await with considerable interest your reply.

Yours very truly,

AMERICAN MILLS COMPANY."

Q. Was the Hartenfeld Bag Company at the time indebted to the American Mills Company for wares and merchandise theretofore purchased by American Mills Company?

A. Yes, sir.

Q. Was any of that merchandise received up to July 24, 1918?

A. Any of which merchandise?

Q. Owing to American Mills Company by Hartenfeld Bag Company?

A. There might have been a small amount.

Q. Was any substantial amount of it received?

A. I don't think so.

Q. What was done on or about July 24th relative to that situation?

A. A telegram was sent from our office to the Hartenfeld Bag Company, 316 N. Carpenter Street, Chicago, Ill.:

"Advise when we may expect Mr. Hartenfeld."

(Signed) "AMERICAN MILLS COMPANY."

237 Q. Was any other communication sent Mr. Hartenfeld on that day?

A. A letter left our office, written by Mr. Lovitt, dated July 24th, as follows:

"Hartenfeld Bag Company,
316 N. Carpenter Street,
Chicago, Ill.

GENTLEMEN:

We wired you as per confirmation which we are enclosing, and sincerely trust that you will advise us at once.

We wish to call your attention that you wrote us last Saturday that the 15,000 coffee Bags were already shipped to Swainsboro, Ga., and that the bill of lading did not return Saturday afternoon, but you would have it Monday.

It is now Wednesday morning, and we have not as yet received the bill of lading. We believe if you had mailed it any time during Monday, or even as late as 9 o'clock Monday night, that it would have been here this morning. This leads us to believe that these bags have not as yet been shipped.

You realize that we paid the note for $9,100.00, with the understanding that you would take care of your obligations, as in your last promise, and we sincerely trust that you will advise us when you *except* to ship these bags.

Yours very truly,
(Signed) AMERICAN MILLS CO."

Dictated—"sl-wa."

238 Q. In July, 1918, the Hartenfeld Bag Company shipped you some bags, did it not, in bale to the Savannah Guano Company on the order of the American Mills Company?

A. They shipped them to——

Q. Just answer yes or no?

A. Yes, sir.

Q. Did you write the Hartenfeld Bag Company with reference to that shipment?

A. We wrote a letter under date of July 31, as follows:

"Hartenfeld Bag Co.,
316 N. Carpenter Street,
Chicago, Ill.

GENTLEMEN:

We are in receipt of a letter from the Savannah Guano Company and one of the paragraphs in their letter reads as follows:

'Our factory advised us to-day that some of the bales in this carload show only 475 bags in the bales. We have stopped them opening up any further bales until we could get instructions from you as to what you wished done. Please advise us as you have done in

similar cases in the past, and put us in position to open up bales and have bags counted out, also informing us if you will have a representative present or not.'

We are sick and tired of this whole transaction and we are not going to make ourselves responsible any more, but are going to leave this entirely up to you. If you care to have one of your men go to Savannah you can do so, and wire us what you wish done, as we are not going to tell this concern as we have in the past to go right along with the bags, and let us know what the shortage is.

You will note there is a shortage here the same as we have been getting in the past, and we want you to wire us just what to do so we can advise these people. The writer is sick and tired going to Savannah in regard to these shipments, for on every one so far, I have found that the Savannah Guano Co.'s complaints are perfectly right.

Please let us hear from you at once.

Yours truly,

AMERICAN MILLS COMPANY."

"al-ww."

Q. Did the Hartenfeld Bag Company reply to that letter?
A. They replied under date of August 8th, as follows:

American Mills Co.,
Atlanta, Ga.

GENTLEMEN:

Your favor of the 31st relative to the Savannah Guano Company, we know that the count is correct and there is nothing that we can do in the matter. You know what to do in the premises as well as we do, and all that we can tell you is to do the best you can, as we are anxious to get out of this transaction ourselves.

Very truly yours,

HARTENFELD BAG CO.
I. SIMON."

"E. J. H.-S."

Q. Previous to the sending of the telegram of July 24th, 1918, which read as follows: "Advise when we may expect Mr. Hartenfeld," had Mr. Hartenfeld in any way stated that he would come to Atlanta?
A. He wrote us under date of July 15, 1918.
Q. That he would come to Atlanta, did he?
A. Yes, sir.
Q. Have you that letter here if so read it?
A. That letter reads as follows:

"American Mills Co.,
Atlanta, Ga.

GENTLEMEN:

Confirming 'phone conversation and supplementing our night letter of yesterday, the writer will try to come down to Atlanta Saturday; and in the meantime hopes to hear from you relative to our night letter.

We also want you to take care of note that is due on the
241 20th, and we will soon have everything properly adjusted.

We will find our rating in Bradstreet today $50,000.00 to $75,000.00, and if you desire we can send you our commercial paper if this will help you.

With best wishes, we are

Very truly yours,

HARTENFELD BAG CO.
(Signed) E. J. HARTENFELD."

E. J. H.-S.

Q. How many bags did the Hartenfeld Bag Company owe the American Mills Company in July—about July 12, 1918—in connection with the Stein Company transaction?

A. 21,323.

Q. Did you receive a wire from Hartenfeld Bag Company relative to that subject on or about July 12, or 13?

A. Yes, sir.

Q. What was that wire?

A. The wire is dated July 12th, day letter, and is as follows:

"American Mills Co., Atlanta, Ga:

Stein Bag Co. order fifteen thousand three hundred and twenty-three bags owe you on old contract six thousand totalling twenty-one thousand three hundred twenty-three bags in order to make up car load and reduce rate will book you for forty to fifty thousand to be shipped next week the balance of the bags not due you to
242 be sold on thirty days basis open terms.

(Signed) HARTENFELD BAG CO."

Q. Was that word "not" correctly used or was that "not" to be "now?"

A. Yes, the word not, should be now.

Q. Was any letter written by American Mills Company to Hartenfeld Bag Company in response to that?

A. We wrote them under date of July 13th.

Q. Was that telegram quoted to them?

A. Yes, sir.

Q. What was written after that, in that same letter?

A. After quoting the telegram we wrote:

"Wired you as per confirmation which we are enclosing. We also wish to state, that I bought these bags upon my own responsibility,

as I had been advised to not buy any more bags from the Hartenfeld Bag Co. until everything was straightened up, and I sincerely trust that you will take care of this shipment so that I will not be criticised any further."

That letter evidently was written by Mr. Lovitt.

Q. You have already testified to a letter received by American Mills Company from Hartenfeld Bag Company under date of August 8th, relative to the Savannah Guano Company; was that letter replied to and if so in what form?

A. We replied to that letter under date of August 13th, Mr. Lovitt replied.

Q. What was that etter?

A. The letter reads as follows:

"Hartenfeld Bag Company,
316 N. Carpenter Street,
Chicago, Ill.

GENTLEMEN:

We are in receipt of your letter of the 8th in reference to the bags that are now in Savannah, where you state that the amount is correct.

In this connection the writer wishes to say that he has made several trips to Savannah on account of the Hartenfeld Bag Company, and I am not anxious to go again, for on each occasion I found that the Savannah Guano Company was correct in the stand which they had taken.

It seems that every lot of bags which we buy from you, there has to be a shortage. On the car which was shipped to Atlanta, it was supposed to have 100 bales, but this entire car was short. The car which you shipped from Houston, Texas, was short 15,000 bags which were shipped to Savannah some time ago, was 4,664 bags short. The 20,000 bags that were shipped to Savannah were 5,000 bags short. You know these shortages to be a fact.

The writer does not feel like going down to Savannah, as I know that the Savannah Guano Co. is a very reliable concern, and are not taking advantage of anyone. However, we think it would be a good idea for the writer to take a trip to Savannah for a week, and while there I will take him to Savannah, and in the meantime I will write the Savannah Guano Co. to hold this open for a few days.

Yours very truly,
(Signed) AMERICAN MILLS CO.

S. L.-W. W."

Q. On August 20th, 1918, did the Hartenfeld Bag Company owe the American Mills Company any bags?

A. Yes, sir.

Q. Was a wire sent on that date with reference to it?

A. Yes, sir.
Q. What was in that wire?
A. August 20th, day letter.

"Mr. E. J. Hartenfeld,
c/o Hartenfeld Bag Co.,
312 No. Carpenter Street,
Chicago, Ill.

Last note seven thousand six hundred dollars due Thursday by that time must have bills lading for coffee shipments which you have promised from time to time. Cannot explain by wire how
245 important this is but trust you will understand expect immediate compliance with our request.

AMERICAN MILLS CO.

Day letter collect."

Q. Did Hartenfeld Bag Company, after receiving that letter, promise to send those coffee bags?
A. We received a telegram—yes, sir.
Q. In the form of a telegram?
A. Yes, sir.
Q. What was that telegram?
A. The telegram is dated Chicago, August 19, received in Atlanta, Aug. 20, to American Mills Co., Atlanta, Ga.:

"Will ship more coffees this week investigating shortage of fourteen bales are you interested carload meals one hundred forty dollars thousand our confirmation wire immediately.

HARTENFELD BAG CO.

Q. Did the Hartenfeld Bag Company owe, under contracts to the American Mills Company, any coffee bags, and jutes on August 22nd?
A. Yes, sir.
Q. Did they on or about that date make any promises to ship any of that merchandise?
A. On August 22nd they sent us a telegram.
Q. What did they say in that telegram?
246 A. —.

"American Mills Co.,
Atlanta, Ga.:

Will ship five thousand coffee this week five thousand early part of next week jutes next week could not claim the jutes as have Govt. contract on cement bags which requires our wheel and have to be shipped to the marine corps on all other bags we are offering you and burlap will ship same open terms and if interested wire order particularly let us know about the burlap as this is first class bleachery burlap pay the note and we will take care of everything answer.

(Signed) HARTENFELD BAG CO."

Q. Were you in Chicago about Aug. 4th, 1918?
A. Yes, sir.
Q. Did you see Hartenfeld, or the Hartenfeld Bag Company?
A. Yes, sir.
Q. What did you see him about at that time?
A. I saw him about the Savannah matter.
Q. What was the Savannah matter?
A. They owed us merchandise to cover shortages and replacements of goods.
Q. Did you make any agreement, verbal or otherwise, with the Hartenfeld Bag Company at that time?
A. I made an agreement at that time on different items.
Q. Was it verbal?
A. It was written, I think.
Q. Was there a contract?
A. There was not a contract—no, sir. It was just—I guess an agreement which he signed he would agree to adjust the
247 Savannah matters before Sept. 20th.
Q. Do you know where that paper is?
A. I think you will find it in the file there. It is written in my handwriting I think.
Q. I show you a paper marked August 3rd, 1918, and I will ask you whether that is the agreement about which you have just spoken?
A. Yes, sir.
Q. I will ask you to read that into the record,—I will ask you to read that paper.
A. —

"Hotel La Salle, Chicago, 8/3/1918.

American Mills Co.,
Atlanta, Ga.:

We will place before September 20th, 1918.
9,558 bags replaced.
6,700 shortage.
3,022 to be returned and replaced by us.

Yours truly,
(Signed) HARTENFELD BAG CO.,
E. J. HARTENFELD,
Pres."

Q. Did Mr. Hartenfeld replace those 9,558 bags?
A. I don't think so.
Q. Did he carry out his agreement of Aug. 3rd, 1918?
A. No, sir.
Q. Did any of the items figure in the payments made to the American Mills Company by Hartenfeld Bag Company on Oct. 3rd, 1918?
248 A. Let me have the Sept. 20th—no the statement of Oct. 3rd, please.
Q. The statement of Oct. 1, you mean?

A. I mean Oct. 1st, (examining paper). We paid it Oct. 3rd—yes, sir.

Q. Which item is covered in the paper of Oct. 1st, which is Surety Company Exhibit No. 2?

A. There was amongst shipments made to Savannah Guano Company one lot of 5,000 bags, not coffees, difference of 16c per bag, $800.00; rejected bags at Savannah, Guano Company, Savannah, Ga., $12,580, a difference in market value of 14c per bag, $1,761.20.

Q. Those were not replaced, you say, by the Hartfeld Bag Company?

A. No, sir.

Q. It is true, is it not, that the American Mills Company had to go into the open market to replace those items?

A. Yes, sir.

Q. You have already testified to the sending of the letter of July 9, 1918, to the Hartenfeld Bag Company—I am showing you that to refresh your recollection——

A. Yes, sir.

Q. Was any rely received to that letter by American Mills Company?

A. Yes, sir.

Q. From the Hartenfeld Bag Company?

A. Yes, sir.

249 "Chicago, July 12, 1918.

American Mills Company,
Atlanta, Ga.

GENTLEMEN:

Your favor of the 9th relative to note due June 20th, we ask that you promptly take care of this without fail.

For your information will state that we had expected the 15,000 bags in a couple of days ago and are just unloading same today. We want to be careful in every respect and this shipment will go out within the next few days but will be all right.

We are filled up at the bank now and this is a very importune time to call upon us to send you a check otherwise we would do so, but we feel that you can take care of same. If you cannot, we will send you our note, for let us say thirty days, to cover difference of 15,000 bags and the amount of the note and will arrange to make the shipments shortly after.

You know that we have had hard luck with Savannah and had to replace 15,000 bags, which we never expected, and for your own sake we would suggest to you that you do not push us now as it would not do any good to either of us.

We will get the Stein Bags out next week also as the writer
250 is taking active care of same himself and if you will only be patient we know that we will have everything come out all right.

We want you to wire us Monday stating your exact status in the matter as you must meet your notes under all conditions. If you

wish us to get you a Surety Bond from a Surety Company, stating that we will deliver the contract of bags within ninety days, we will also forward same to you.

In the meanwhile, if there are any other bags you desire we are going to make open shipment to you and give you thirty days time so you can examine same and feel satisfied.

There is no use crowding to make the shipment of the coffee bags before Wednesday or Thursday as we want to have good selected bags and we want to avoid further trouble. In the meanwhile, please advise us where you wish this shipped. Next week we will follow same up with a shipment of 10,000 bags, and slowly but surely we will clean up all these matters.

If you will but have patience as outlined everything will work out satisfactorily and we will prove to you that all of these things will be cleaned up in a nice manner. You will please wire us Monday on receipt of this letter, and oblige,

Very truly yours,

(Signed) HARTENFELD BAG CO.
E. J. HARTENFELD.

E. J. H.-S."

251 Q. You have already testified that on July 24th, American Mills Company wired Hartenfeld Bag Company when Mr. Hartenfeld would be in Atlanta?

A. Yes, sir.

Q. Was any reply received to that wire?

A. We received a telegram dated July 25th, 1918, which reads as follows:

"American Bag Co.,
Atlanta, Ga.:

Doctor advises waiting until Monday or Tuesday of next week as I may have to be operated before that time however if you want me to come I will take the train tonight and there is no bunk to it. Swainsboro bill lading mailed you Monday have you received same. Macon shipment should go out this week as we have a carload of bags on track containing ten thousand insides and we will immediately send you same we have bought more insides for the future and if you will only have patience everything will come out all right.

E. J. HARTENFELD."

Q. Was the Macon shipment ever sent by the Hartenfeld Bag Company?

A. The Macon shipment? I think not.

Q. Did you receive a letter from the Hartenfeld Bag Company written July 25th, the same date with that wire which you have just read?

A. Yes, sir.

252 Q. What was said in that letter?

A.—

"Chicago, July 25th, 1918.

American Mills Co.,
Atlanta, Ga.

GENTLEMEN:

We are herewith enclosing telegrams exchanged which are self explanatory.

The writer has now been ill for about ten days with a very bad appendix and has been advised to have an operation performed some time ago but due to the fact that we are so busy and that a soldier can ask no reprieves, I thought it best to stick to the post and have everything satisfactorily attended.

If you will but have patience everything will be righted and the ship will once more smoothly sail over the seas. I am making good in every one of my projects but I want to make good for others as well as myself and if you knew me well enough you would not hesitate to take my statement 100%. I believe that when I meet you that I will satisfactorily be able to explain every detail; be able to satisfy you and if I die in the meanwhile there is an additional $180,000.00 insurance which could be very easily liquidated into ready money to pay my creditors as well as my other matters.

253 Of course, I am not fearing death at all as the Doctor on the contrary informs me that I am improving nicely and if I will but have patience I will be all right as the inflam-ation is going down. Of course a fellow of my activity is damned if he does and damned if he don't and I am ready to play the game any way my good friends see fit.

I only want you to keep a little kindness in your heart for me when I arrive because I want your friendship above your business and your money. When we meet as well as part I want you to feel I am trying to do everything that is right as I know you would want me to do.

With every good wish, I beg to remain,

Very sincerely yours,
(Signed) EDDY."

E. J. H.-S.

After the telegram was received of July 25th, which you have read into the record, from Mr. Hartenfeld, was any letter written by the American Mills Company to Mr. Hartenfeld and if so on what date?

A. Yes, sir; on July 26th.

Q. Read that letter.

A. —

254 "July 26, 1918.

Mr. E. H. Hartenfeld,
% Hartenfeld Bag Co.,
316 N. Carpenter St., Chicago, Ill.

DEAR SIR:

We are in receipt of your telegram of the 26th, and the writer is very sorry to note that you are not feeling well, and I sincerely trust you will recover fully without the necessity of an operation. As stated in my telegram to you, that we do not wish you to jeopardize your health in making the trip down here, for if if is necessary Mr. May will go to Chicago to see you, for we believe it is absolutely necessary for us to straighten out this entire transaction, as we have lots of money involved in this, and we do not know how we are going to get it straightened out with the Savannah Guana Co. by mail.

We have written you several times in regard to the shortages as well as rejected bags which they returned to you, and you failed to advise us definitely so we could advise them accordingly. They are continually after us, and we in turn do not know what to advise them, and for this reason it will be best for you to come here or if your health will not permit, Mr. May will have to go to Chicago.

255 Note that you will make the shipment of bags to Macon this week, and trust we will receive B/L not later than Monday A. M.

We note that you ask us to have patience in your telegram, and I believe that you certainly know that we have been patient with you, and trust that you will straighten this entire matter out for us as soon as possible.

Yours very truly,
(Signed) AMERICAN MILLS CO.

al-ww."

Q. Mr. Hartenfield did not come to Atlanta, did he, after you wrote that letter?
A. No, sir.
Q. And you went to Chicago, did you not?
A. Yes, sir.
Q. In Chicago, Mr. Hartenfeld representing the Hartenfeld Bag Company, promised, did he not, to ship a carload of jutes inside of ten days?
A. Yes, sir.
Q. Did he also not, promise to ship the coffee bags?
A. Yes, sir.
Q. Did he make those shipments as promised?
A. No, sir.
Q. The American Mills Company wrote a letter, did it not, to the Hartenfeld Bag Company on Aug. 22nd, with reference to that subject?

A. Yes, sir.
Q. What was that letter?
A. "Aug. 22nd, 1918.

256 "Hartenfeld Bag Co.,
316 N. Carpenter St.,
Chicago, Ill.

GENTLEMEN:

We are in receipt of your telegram which reads as follows, and we wired you as per confirmation which we are enclosing:

'Your telegram just getting goods in order and cannot ship coffees until end of this week but can ship perhaps about 5,000 tomorrow offered you an additional car of meals and can make shipment immediately at $140.00 per thousand. Have in addition 30,000 lb. No. 1 burlap we just purchased and can make continuous delivery what can you pay for same you must pay this note as discounted otherwise same will prove injurious to us we will take care of all other matters if you do not push us everything will work out satisfactorily. Wire accordingly.'

When Mr. May was in your city you promised to ship a carload of jutes inside of 10 days, and it has been some time, and you have not done so. You also promised to ship coffee bags, and you have also failed to do this. It seems to us that when you are hard up for money, you promise anything and in reality, you do not mean half the things you say. We therefore wired you asking you to let us know exactly when the bags would be shipped, so that we
257 could advise our customer accordingly.

Yours very truly,

(Signed) AMERICAN MILLS CO.,
Per —— ——,
Mgr.

al-ww."

Q. The Hartenfeld Bag Company, through Mr. Hartenfeld, agreed to ship some bags, did it not, on Saturday succeeding the day that you were there in the early part of August?
A. Yes, sir.
Q. Were those bags shipped as promised?
A. No, sir.
Q. You sent a wire, did you not, to Mr. Hartenfeld, about it?
A. Yes, sir.
Q. On what date?
A. Aug. 8, 1918.
Q. What was said in that wire?
A. —.

"Mr. E. J. Hartenfeld,
Care Hartenfeld Bag Co.,
312 N. Carpenter St.,
Chicago, Ill.:

Where is lading on bags shipped Saturday. Wire quick important.

(Signed) ARMAND MAY."

Collect.

Q. On August 16th, or up to that date, had the Hartenfeld Bag Company replaced the shipment of 9,000 bags to Macon?

A. No.

258 Q. Was any letter written to Mr. Hartenfeld about that?

A. Yes, sir.

Q. Read that letter?

A. —.

"8/16/18.

Mr. E. J. Hartenfeld,
Hartenfeld Bag Co.,
312 N. Carpenter St.,
Chicago, Ill.

DEAR SIR:

Attached find confirmation of telegram which we have just sent you.

It seems a shame that your promises given our Mr. May have gone for nothing. Since he left you have only shipped ten thousand which you advised you had shipped the day before he left, which, however, were not shipped until the following week.

Now, the nine thousand bags to Macon have never been replaced. It is certainly a shame that you are treating us in this manner.

You have instructions for all the other bags and we ask you to ship them immediately because we cannot hold this matter open indefinitely.

I hope you will give this your attention.

Yours very truly,

AMERICAN MILLS COMPANY."

259 Q. Did you write anything further to Hartenfeld Bag Company in reference to that same transaction, and if so what date?

A. Yes, sir; on August 17, 1918, the following:

L. G. S.:L. G. R.

"Hartenfeld Bag Co.,
312 N. Carpenter St.,
Chicago, Ill.

GENTLEMEN:

We wish to acknowledge receipt of your favor of the 15th inst. in which you state that the shipment of coffee bags to Macon will receive your attention.

There is absolutely nothing in this letter to indicate when this shipment is going forward, and we are certainly disappointed that you are treating this matter in such a fashion.

Either tell us that you are not going to ship or that you are going to ship, but don't just theorize and say that this is having your attention, because judging by the last two weeks, this is not having your attention.

It is quite disgusting to have these shipments held up for this length of time.

Yours very truly,

(Signed) AMERICAN MILLS COMPANY."

260 Q. It is true, is it not, that the American Mills Company concluded on or about Aug. 20th to have no further dealings with the Hartenfeld Bag Company until all of these matters of deliveries had been adjusted?

A. Yes, sir.

Q. Was any letter written to the Hartenfeld Bag Company advising them of that fact?

A. On Aug. 20th, 1918, we sent the following letter:

"GENTLEMEN:

We are in receipt of your telegram which reads as follows:

'We will ship more coffees this week investigating shortage of fourteen bales are you interested carload meals one hundred forty dollars thousand our confirmation wire immediately.'

Beg to state we wish to get all our old business straightened out before purchasing any more bags. As soon as we get everything cleaned up, we will gladly start doing business again, but we must clean up all of our old affairs first.

Very truly yours,

(Signed) AMERICAN MILLS CO.,

Per —— ——."

sl-ww.

261 Q. Did you write to Hartenfeld further that you would make no more purchases of the Hartenfeld Bag Company until they had completed every shipment that they were then under contract to make to the American Mills Company, and if so on what date did you write the letter?

A. Yes, sir; on Aug. 23rd, 1918, we wrote this letter:

"Aug. 23, 1918.

DEAR SIR:

We are in receipt of your telegrams of the 22nd and 23rd, and wired you as per confirmation enclosed.

I cannot see how I can buy any goods from you at this time on account of the trouble which we are having on each and every shipment which you make. I have been criticised so here that I am

going to leave the entire matter between the American Mills Co. and the Hartenfeld Bag Co., that is as far as buying bags in the future is concerned, with Mr. May, for the business dealings which I have had with you have been very unprofitable. First of all you sell us bags at a price which we could buy elsewhere, and which are not No. 1 and in accordance with the contract, and also short count. On some of the goods which you have been shipping, I have been severly criticised by the American Mills Co., and I am ashamed to face my customers. For instance, on the two bags which I am mailing to you today, you will note that these are wrapped, and if you will look under the first sheet of paper, you will find who 202 the buyers of these bags are. They were shipped to the Huntsville Warehouse Co. Huntsville, Ala. but the International Agricultural Corp. of this city are the buyers. These two bags were returned to me and it was necessary for me to go to the International concern, and I was really ashamed myself when I saw the bags. I am also enclosing you part of a letter which the International people wrote us in regard to these bags, which reads as follows:

'You recently shipped 5,000 inside coffees to Huntsville Warehouse Co., Huntsville, Ala., and we are today advised by them as follows:

"We received the 5,000 coffee bags from them and find they are long way from No 1 coffee bags. We have opened one bundle, supposed to contain 500, but it counted out 486. We find 46 bags in this bundle that are unfit for fertilizer. We are sending you by mail two of these bags as samples. We have filled these bags with fertilizer before we knew they were so bad, and upon attempting to handle them, the bags were left in the condition you will find them. These bags probably have been used for fertilizer before, and the fibre rotted. They were then washed and shipped to us as No. 1 coffee bags. It is possible that we still have not found out every bad bag in this lot, as we have only tried them with our hands for strength".'

203 We are sending you by bearer the two bags which we have received from them, both of which you will note burst when filled with fertilizer. They are badly discolored, which may possibly be due to the fact that they burst when filled with fertilizer at Huntsville, but the fact that they burst when filled with fertilizer indicates that something has been done to the bags to destroy the strength of the fibre.'

We cannot understand how you can ship out bags of this sort. First, you know they won't pass and second, when you sell us #1 bags and ship a bag of this sort, I would term this as defrauding. It would be different if you did not know what a #1 bag was, but I consider you a good bag dealer, and you, yourself, would not buy these bags for #2's, so why ship them to us as #1's?

You will also note out of the first bale which they opened there were 14 bags short and 46 bags which were in very poor condition. They also state that they possibly have not found all the bad bags

in this first bale which they opened as they have only passed their hands over them, and they claim that lots of them have been used for fertilizer.

In your telegram you state that both the meal bags as well as the burlap is a good purchase and are in #1 condition. I wish
264 to say at this time that we are in the market for both of these articles, and you have promised us the same thing in the past, and when the shipment arrives, it is never what you promised and we believe that you yourself would take the stand which we have taken.

However, we hope that you will get all of our affairs straightened out very soon, at which time we would like to begin doing business all over again, buy only in one way, not your guarantee, but shipping the goods right in the first place.

You must also bear in mind that when you ship a bad lot of bags and replace the bags, that does not show that you are a good shipper of bags, for a good shipper of bags ships the proper bags in the first place.

In regard to the Huntsville shipment, I am advising those people today to either go through the entire shipment and keep the bags which are satisfactory, and we will pay for the labor of doing same, and return the balance, or to return the entire shipment and we will make them reshipment.

I would like to hear from you as soon as possible in regard to this, and if you think best for me to come to Chicago, I will gladly meet you there and let's get this thing settled, and if you are in
265 position to handle our business on the coffee bags, we will purchase elsewhere your account.

Trusting that you are again enjoying good health, I beg to remain,

Very truly yours,

AMERICAN MILLS CO.

Per —— ——,
Mgr."

al-W. W.

Q. At whose suggestion did you go to Chicago, do you recall?
A. We received a telegram from Mr. Hartenfeld.
Q. What was that?
A. We sent him a telegram under date of Aug. 23rd:

"Hartenfeld Bag Co.,
316 No. Carpenter St.
Chicago, Ill.:

Telegram received. Will not purchase further goods until all other matters settled. Just received two samples from Huntsville Alabama mailing you same under separate cover which are absolutely rotten. You are simply ruining our business. All business we do in the future goods will have to come to Atlanta for inspection first Writing fully.

AMERICAN MILLS COMPANY."

Q. What was meant by the expression: "Until all other matters settled"? Did that refer to the payment of moneys the American Mills Company or did it refer to the shipment of merchandise?

A. Shipment of merchandise.

Q. It is true, is it not, that on Aug. 26th, 1918, Mr. Hartenfeld, rather the Hartenfeld Bay Company, requested that you send Mr. Lovitt or some one else to Chicago?

A. Yes, sir.

Q. Was it not in response to that that Mr. Lovitt and Mr. Strauss went to Chicago?

A. Yes, sir.

Q. They were there on Aug. 29th, were they not?

A. Yes, sir.

Q. In response to that telegram?

A. I don't know—I don't know what date they arrived in Chicago.

Q. Mr. Lovitt and Mr. Strauss got to Chicago around the middle of September, did they not?

A. I think it was about Sept. 14th, I am not sure.

Q. Did you write Mr. Hartenfeld further the latter part of August, with reference to a shortage of merchandise and his failure to make shipments?

A. Yes, sir.

Q. What was said in that letter?

A. 8-28-18.

"Mr. E. J. Hartenfeld,
c/o Hartenfeld Bag Co.,
312 N. Carpenter St.,
Philadelphia, Penn.

DEAR MR. HARTENFELD:

I have been away from the city for two weeks and upon my return I learned, with considerable disappointment, that practically nothing has been done with reference to the adjustment of your account.

It seems to me that you would impress upon your associates, if it is not possible for you to personally attend to this, to fulfill your obligations promptly.

Have you ever heard about the little boy who was attending flock of sheep and for sport he would blow the horn for danger calling them that the wolf was near to eat up the sheep. This little boy did this for about a half dozen times——"

Q. The letter which you are reading from, Mr. May, is a letter which has already been offered in evidence by American Surety Company as its Exhibit No. 8, and you need not read the balance of it. The American Mills Company purchased of the Hartenfeld Bag Company on or about Aug. 29th, 1918, 50,000 meals and 100,000 lbs. burlap, did it not?

A. Yes, sir.

Q. The purchase price aggregating $9,225?

A. Yes, sir.

268 Q. That was done—that arrangement was by telephone conversation, was it not?

A. Yes, sir.

Q. Was there any letter received from the Hartenfeld Bag Company confirming that?

A. A letter dated Aug. 30th, 1918:

"American Mills Co.,
Atlanta, Ga.

GENTLEMEN:

Confirming conversation held by writer with your Mr. Lovitt, we have shipped out 50,000 meals and 10,000 lbs. burlap, invoice and bill of lading which we are herewith enclosing. We are billing upon you 90 days net as Mr. Hartenfeld wishes to have all of the matters cleaned up and equally balanced between ourselves and this will help in doing so.

We are disappointed in the inside Coffee Bags which we had expected to ship last Saturday but these were in a car situated outside of Chicago but we cannot get to them. Railroad conditions here are frightful and Mr. Hartenfeld wired you due to the fact that the writer thought that we would be able to make shipment last week. I took this matter up with Mr. Hartenfeld and he wishes you to wire us and inform us at what prices you can secure inside coffee bags and will possibly try to make some arrangement

269 to clean up the contract for the difference in price.

The bags to Savannah we will take care of ourselves but the other contracts is possible we would like to be relieved of.

Mr. Hartenfeld is very busy opening up extensive offices for his mining proposition in Chicago, which look tremendously big and the future of this stock looks most encouraging. He has not been able to give much attention to the bag business due to this and this letter is written at his dictation acquainting you of all circumstances relative to different matters. Will you please wire us Monday as requested and we will take further action.

Very truly yours,
(Signed) HARTENFELD BAG CO.
J. SIMON."

Q. The 50,000 meals and 10,000 lbs. of burlap were sold on 90 days net, were they not?

A. Yes, sir.

Q. What does that mean?

A. That means that we would not——

Q. What did it mean, that 90 days?

A. That the bill was not due in 90 days from——

Q. In other words, the American Mills Company was to pay $9,225 in 90 days after these goods were shipped?

A. If the goods were as represented.

270 Q. Well, I am not asking you that?

A. Yes, sir.

Q. Was your account which represented that shipment the one that was subsequently assigned by the Hartenfeld Bag Company to the Commercial Credit Company of Baltimore?
A. Yes, sir.
Q. Were those goods received and accepted by the American Mills Company?
A. No.
Q. Were any part of those goods rejected by the American Mills Company?
A. Yes, sir.
Q. Why?
A. Because they were not #1 bags.
Q. How much of those goods were accepted and paid for in dollars and cents?
A. #1 sewed burlap was as represented and was paid for accordingly.
Q. How much paid?
A. It amounted to about $1,800.
Q. Is there anything here from which you can get the exact figures?
A. I think the invoice is there.
Q. Well, don't think or guess about it, just tell us what you know.
A. I think there is a letter to the Commercial Credit Company.
Q. Under what date?
A. I don't know what date, showing the settlement.
Q. You paid to the Commercial Credit Company, did you not, for merchandise covered by invoice of Aug. 29th, 1918, on Nov. 29, 1918, the sum of $1,894.52?
A. We paid them that amount—yes, sir.
Q. On Sept. 2nd, the Hartenfeld Bag Company owed the American Mills Company for inside coffee bags, did they not?
A. Yes, sir.
Q. That is to say, they owed the coffee bags?
A. They owed the coffee bags.
Q. At what price had they been bought—at 30½c. was it not?
A. Yes, sir.
Q. They had not been received by the American Mills Company, had they?
A. No, sir.
Q. Did the American Mills Company wire the Hartenfeld Bag Company with reference to the coffee bags?
A. We wired them under date of Sept. 2nd, 1918, as follows:

"Possibly be able to purchase insides at thirty two one half cents in Chicago wire if satisfactory and will try cover on as many as possible Advise immediately

AMERICAN MILLS COMPANY."

Q. The Hartenfeld Bag Company replied to that wire, did it not?
A. They replied under date of Sept. 4th as follows:

"American Mills Co.,
Atlanta, Ga.:

Replace bags at thirty two half cents and charge us with difference. Can you use about thirty thousand gold medals and chick feeds sixteen cents, and about ten thousand heavy sugar centals, once used eighteen cents, all Chicago, subject our confirmation
272 wire

HARTENFELD BAG CO."

Q. Did the American Mills Company purchase for replacement the bags at 32½ cents?
A. Yes, sir.
Q. The Hartenfeld Bag Company allowed, as a credit to the American Mills Company, for the difference between 30½ cents on 50,000 bags and 32½ cents on 50,000 bags, the sum of 1,000.00 did it not?
A. Yes, sir.
Q. That was paid for, was it not, on or about Sept. 14th?
A. Yes, sir.
Q. At the time when Mr. Lovitt and Strauss were in Chicago?
A. Yes, sir.
Q. And at the time when the Hartenfeld Bag Company gave to the American Mills Company a check for $2,726.41?
A. Yes, sir.
Q. The early part of September there was a claim made against the American Mills Company by the Courteen Seed Company, of Milwaukee, was there not?
A. Yes, sir.
Q. Was that on a shipment which had theretofore been made to the Courteen Seed Company by the Hartenfeld Bag Company?
A. Yes, sir.
Q. At the request of the American Mills Company?
A. Yes, sir.
Q. That claim was for $460.00, was it not?
A. Yes, sir.
Q. How much did the Hartenfeld Bag Company finally allow the American Mills Company on that claim?
A. $230.00, I think.
273 Q. That was credited to the American Mills Company, was it not?
A. Yes, sir.
Q. On or about Sept. 14th, 1918?
A. Yes, sir.
Q. Now, Mr. Lovitt, and Mr. Strauss received a check from the Hartenfeld Bag Company for $2,726.41?
A. Yes, sir.
Q. That claim of the Courteen Seed Co. was for defective merchandise, was it not?
A. Yes, sir.
Q. The American Mills Company tried to reach the Hartenfeld Bag Company by phone the early part of September, do you recollect that?

A. Yes, sir.

Q. Do you remember wiring the Hartenfeld Bag Company with reference to your inability to reach Mr. Hartenfeld over the telephone?

A. We sent him a telegram under date of Sept. 11, 1918, time 5.20 P. M., as follows:

"Hartenfeld Bag Company,
316 N. Carpenter St.,
Chicago, Ill.:

Have tried to get you on phone but seems you don't care to talk to us. Will expect you to call us sometime today on phone. Wire us when you are willing to talk.

AMERICAN MILLS COMPANY."

Q. Now right after that, Mr. Lovitt and Mr. Strauss went to Chicago, did they not?

A. Yes, sir.

274 Q. At whose request did Mr. Lovitt and Mr. Strauss go to Chicago?

A. We received a telegram on Sept. 12th, as follows:

"American Mills Co.,
Atlanta, Ga.:

Writer absent from office several days due to unforeseen causes cannot make delivery carload jutes except in about thirty days from date suggest Lovitt coming to Chicago to adjust all matters.

HARTENFELD BAG CO."

Q. Was it in response to that wire that Mr. Strauss and Mr. Lovitt went to Chicago?

A. Yes, sir.

Q. Do you know what Mr. Lovitt and Mr. Strauss went to Chicago for?

A. They went to see about getting deliveries.

Q. Did they get any wire from Mr. Hartenfeld before they started?

A. They got a wire dated Sept. 12th as follows:

"Sam Lovitt, c/o American Mills, Atlanta, Ga.:

Your wire get all memorandum of insides and other bags if you arrive Friday night will be glad to meet you.

E. J. HARTENFELD."

275 Q. Well, you were present in Chicago when Mr. Lovitt and Mr. Strauss were there with Mr. Hartenfeld, were you?

A. No, sir.

Q. You know, as a matter of fact, do you not, that when Mr. Strauss and Mr. Lovitt were in Chicago they issued two notes to the Hartenfeld Bag Company, one for $4,485.08, which is American

Surety Company Exhibit No. 14, and one for $4,650.00, American Surety Company Exhibit 15?

A. Yes, sir.

Q. Those two notes were issued, were they not, in payment of the invoice of August 29th?

A. Yes, sir.

Q. The invoice of August 29th was not due, was it, until 90 days after August 29th?

A. Yes, sir.

Q. After Mr. Strauss and Mr. Lovitt came back from Chicago do you recall the Hartenfeld Bag Company sending to the American Mills Company two invoices for interest upon those notes?

A. Yes, sir.

Q. What became of those invoices?

A. They were returned.

Q. Was any letter written when they were returned to the Hartenfeld Bag Company?

A. Yes, sir; Sept. 23rd, 1918.

Q. That letter was American Surety Company Exhibit 19—was it not?

A. Yes, sir.

Q. Do you recall whether American Surety Company Exhibit #18 had been received at the office of the American Mills Company before you left Atlanta for Chicago?

A. I think it was received after I had left for Chicago.

276 Q. You did not see it before you left for Chicago?

A. No.

Q. Had the telegram from the Commercial Credit Company, dated Sept. 23d, 1918, addressed to American Mills Company, been received before you left for Chicago, at that time?

A. Yes, sir.

Q. It was with reference to that telegram in part was it not, that you went to see Mr. Hartenfeld on that trip?

A. Yes, sir.

Q. Now, previous to your going to Chicago on or about Sept. 23rd, the Hartenfeld Bag Company, by wire, offered to sell to the American Mills Company some merchandise, did it not?

A. They sent us a telegram Sept. 23rd:

"American Mills Co.,
Atlanta, Ga.:

Offer about fifteen to twenty thousand strictly number one insides thirty one half cents fifteen to twenty thousand pounds number one burlap twenty two and half cents our confirmation wire immediately and answer our telegram Saturday.

HARTENFELD BAG COMPANY."

Q. It was in response to that wire, was it not, that the Surety Company Exhibit 16 was sent—well, on Sept. 24th, the American Mills Company responded to that telegram which you have just read in evidence?

A. Yes, sir.

277 Q. And in that telegram the American Mills Company said: "Will buy coffees after you ship the bags you owe us from Savannah," is that right?

A. Yes, sir.

Q. You have already testified on your direct examination that you wired Mr. Hartenfeld that you would arrive at the La Salle street station on Wednesday at seven o'clock, did you not?

A. Yes, sir.

Q. You received a wire, did you not, from Mr. Hartenfeld, saying he would meet you?

A. Yes, sir.

Q. He did not meet you, did he?

A. No, sir.

Q. Did he leave any message for you?

A. Yes, sir.

Q. What was that message?

A. He left a message—on the night of Sept. 25th, when we arrived that he would see me tomorrow.

Q. Did he leave a message at the La Salle Hotel for you?

A. Yes, sir; that he would see me on the 26th.

Q. You then met him on the 26th?

A. Yes, sir.

Q. You also met him on the 27th?

A. Yes, sir.

Q. You didn't spend very much time with him on Sept. 26th did you?

A. I did not spend very much time—no.

Q. Mr. Hartenfeld told you on Sept. 26th that he was very busy and he would have to see you on the following day, did he not?

A. He saw me on the 26th for a little while.

278 Q. He saw you on the 26th for a little while but he told you that he could not spend very much time with you on that day, did he not?

A. I think he did.

Q. You then met him on the 27th in the Kimball Building?

A. Yes, sir.

Q. The office of the St. Clair Oil & Refining Co., or whatever its technical name is?

A. Yes, sir.

Q. You then told Mr. Hartenfeld, did you not, that you had received a notice from the Commercial Credit Company that the Hartenfeld Bag Company had assigned the account of August 29th?

A. Yes, sir.

Q. Did you not say to Mr. Hartenfeld at that time, "How could you sell an account that had been paid?" or words to that effect?

A. I think I did.

Q. Then he said to you, "It was purely a mistake"?

A. Yes, sir.

Q. He told you it was a mistake of Mr. Simon's?

A. Yes, sir.

Q. Did he tell you who Mr. Simon was?
A. No, he did not tell me who he was.
Q. Who was he?
A. He was the man in charge when he was not there.
Q. He had charge of the Hartenfeld Bag Company, did he not, as its manager, in the absence of Mr. Hartenfeld? He kept the records of the Hartenfeld Bag Company?
A. To the best of my knowledge.
279 Q. Don't you recall at that conference that he said he had not anything to do with the banking part of Hartenfeld Bag Company, that Mr. Simon handled them all?
A. Yes, sir.
Q. Did he not also tell you at that time that the two notes, American Surety Company Exhibits 15 and 14 had been discounted by Mr. Simon at the Foreman Brothers Banking Company and that he had nothing to do with it?
A. Yes, sir.
Q. Did he tell you that he had nothing to do with the assignment of the accounts to the Commercial Credit Company because he had signed this account in blank?
A. Yes, sir.
Q. And that then, after he had made those blank assignments, he had nothing further to do with it, that it was done by Mr. Simon in his absence?
A. Yes, sir.
Q. He told you at the time, did he not, that he did not want the American Mills Company to advise the Commercial Credit Company of the error, because it would do the Hartenfeld Bag Company a lot of harm in the assignment of accounts?
A. Yes, sir.
Q. Is it not true that he told you at that time that he would like to begin all over again with the American Mills Company in its business?
A. Yes, sir.
Q. He said to you at that time, did he not, "I am willing to draw a new contract if you will cancel all the existing contracts for
280 the sale of merchandise by Hartenfeld Bag Company to American Mills Company."
A. Yes, sir.
Q. And you said to him, "I don't want to do that unless I can get some assurance and some security that goods are going to be shipped, because of our past experience with you." Do you remember that?
A. Yes, sir.
Q. Now, I am not going to give you the exact words but only the substance of the conversation as I understand it, and what did he say then about giving a surety bond?
A. He says, "I can give you a surety bond."
Q. Did he say anything to you about having given surety bonds in other instances?
A. Yes, he said he gave them in other instances. He said he could get one for $50,000 if he wanted to.

Q. He didn't tell you the name of the surety company, did he?
A. No, sir.
Q. When did you first ascertain what surety company it was he had in mind?
A. When they handed me the bond.
Q. That was on Sept. 28th, was it?
A. Yes, sir.
Q. Did you say to Mr. Hartenfeld, in effect or by inference or in any other way, that you were there to collect money that the Hartenfeld Bag Company owed the American Mills Company? Just answer yes, or no?
A. Yes, sir.
Q. What did you say to him?
A. I told him—ask that question over again. (Question read over.) I came to see about the delivery of our bags.
281 Q. That is not my question. I asked you whether you said anything to him, by inference, directly or indirectly, that you were there to collect money from the Hartenfeld Bag Company?
A. No, sir.
Q. What did you tell him you were there for?
A. I told him I was there to see about the Commercial Credit Company item and about the deliveries that were past due.
Q. And then he told you he wanted to begin all over again, did he not?
A. Yes, sir.
Q. He then called in Miss Sutton, the stenographer, is that not true?
A. I think he did.
Q. Do you remember his dictating to his stenographer?
A. I do not recall whether he dictated in my presence or in another room.
Q. He dictated right there for your inspection the paper which has been offered in evidence as American Surety Company Exhibit 20, of Sept. 27th?
A. Yes, sir.
Q. The typewritten portion of that was prepared in the office of the St. Clair Mining & Milling Co., in the Kimball Building?
A. Yes, sir.
Q. Did you dictate that paper?
A. No, sir.
Q. It was that paper that you took over to your lawyer's office and brought back?
A. Yes, sir.
Q. To Mr. Hartenfeld.
A. Yes, sir.
Q. And when it was brought back it had the pencil words and figures in it in addition to the typewritten portion?
A. Yes, sir.
282 Q. Subsequently to that that paper was transcribed in typewritten form, was it not?

A. Yes, sir.

Q. A copy of that paper—the original copy is in your possession that has been testified about and identified as American Surety Company Exhibit #21 of this date, is that true?

A. Yes, sir.

Q. Who received the other copy of it?

A. I don't know, I imagine the American Surety Company.

Q. I don't care what you imagine, I want what you know about it.

A. I don't know.

Q. Was a copy of it left in Mr. Hartenfeld's office.

A. I don't know.

Q. Do you remember how many copies were signed?

A. I think there were two copies.

Q. Were you present on Sept. 27th when a representative of the American Surety Company came to the St. Clair office?

A. I was not present.

Q. I am asking you if you were present?

A. No, sir.

Q. Did you meet a representative on that day or subsequently of the American Surety Company?

A. Not that I recall.

Q. Did you hand to the American Surety Company the contract a copy of which is in evidence as American Surety Company Exhibit #21 of this date?

A. No.

Q. Did you or any one, so far as you know, representing the American Mills Company, request the American Surety
283 Company to issue the bond in question bearing date Sept. 28th, 1918, signed by American Surety Company?

A. No, sir.

Q. Do you know a man by the name of J. J. Reynolds?

A. No, sir.

Q. Did you ever see him to your knowledge?

A. No, sir.

Q. Did you know a man, so far as you know, by the name of Warren H. Burns?

A. No, sir.

Q. At the time that the agreement which has been offered in evidence as American Surety Company Exhibit #21 was entered into, was it the intention of the American Mills Company that the Hartenfeld Bag Company would deliver to the American Mills Company on its order the merchandise in the contract mentioned within seventy-five days?

A. Yes, sir.

Q. Was it the intention of the American Mills Company that, should the Hartenfeld Bag Company fail to deliver the merchandise in that contract mentioned within seventy-five days, that the Hartenfeld Bag Company would return the $22,100 paid under that contract?

A. Yes, sir.

Q. After Sept. 28th, 1918, did the Hartenfeld Bag Company ship

to American Mills Company any of the merchandise described and referred to in the contract offered in evidence as American Surety Company Exhibit #21 of this date?

A. Yes, sir.

Q. Do you know or can you refresh your recollection by any paper present, how much of that merchandise was shipped by the Hartenfeld Bag Company to American Mills Company or
284 on its order?

A. Yes, sir; there were two shipments.

Q. It was $1,050 worth of merchandise, was it not?

A. Yes, sir.

Q. And that was shipped to Philadelphia on the order of American Mills Company?

A. I think it was shipped to Baltimore.

Q. Well, that is not a matter of importance; it was shipped on the order of the American Mills Company?

A. Yes, sir. There was also another shipment.

Q. Was another shipment made under that contract which was received by American Mills Company?

A. No, sir.

Q. As a matter of fact, the Hartenfeld Bag Company did make a shipment some time in the month of December, did it not, on the order of the American Mills Company under that contract, American Surety Company Exhibit #21, of this date?

A. Yes, sir.

Q. That shipment was stopped in *A*ransitu, was it not?

A. Yes, sir.

Q. Can you fix the date of that shipment, or its ap-roximate date?

A. About Dec. 12th, 40,000 bags.

Q. You are talking now of 40,000 termed No. 1 Gold Medal bags?

A. Yes, sir.

Q. Which was a part of the 50,000 named in the contract, is that right?

A. What price is that?

Q. I didn't say anything about the price. It was a part of the 50,000 mentioned in the contract?

A. Yes, sir.

285 Q. Why did you not pay to the Hartenfeld Bag Company the $22,100.00 on Sept. 28th?

A. Well, I had to come to Atlanta.

Q. To get the money?

A. To get the money.

Q. You didn't have that amount of money with you, did you, in Chicago?

A. No, I had to make——

Q. Well, just answer yes or no?

A. No.

Q. Did the American Mills Company have any bank account in the city of Chicago?

A. No.

Q. Did the American Mills Company have any money in Chicago

which it could draw to pay the Hartenfeld Bag Company $22,100 on Sept. 28th, 1918?

A. No.

Q. Referring to the invoice or statement of Oct. 1, 1918, American Surety Company Exhibit #2 of Sept. 26th, 1919—what were the face amounts of the notes which had been given in payment of the invoice of Aug. 29th, 1918?

A. $9,135.08.

Q. And how much was each of these notes?

A. The note of December 1918, was for $4,650.00, and the note of January was for $4,485.08.

Q. When you say note of December 18th you refer to date of maturity?

A. Date of maturity.

Q. And the note of January the same date of maturity?

A. Yes, sir.

Q. In the invoice or paper which is put in evidence as American Surety Company Exhibit #2, you have testified, have you not, that the figures in dollars and cents after the words "Notes, in payment of invoice of August 29th," should have been $9,135.08 instead of $9,225.00, is that right?

A. Yes, sir.

286 Q. You have also testified, as I understand you, that the figures after the words, "Notes of Hartenfeld Bag Company payable to American Mills Company," should have been $9,225.00 instead of $9,035.08?

A. Yes, sir.

Q. The changing of those figures upon that invoice does not change the sum total at the bottom, which amounts to $21,647.20, does it?

A. No, I don't think it does.

Q. It does, with the exception of $100.00, does it not?

A. With the exception of $100.00.

Q. Has the American Mills Company ever received that $100?

A. No.

Q. What were the amounts of the notes aggregating $9,225.00 which were owing by the Hartenfeld Bag Company to the American Mills Company?

A. A note of $5,000.00 and a note of $4,225.00.

Q. These last two notes—had they not been given to Mr. Lovitt and Mr. Strauss when they were in Chicago about Sept. 14th?

A. They were given by Mr. Lovitt and Mr. Strauss.

Q. I asked you whether they had been given to Mr. Lovitt and Mr. Strauss on or about Sept. 14th?

A. Yes, sir.

Q. Subsequently to Oct. 3rd, 1918, did the American Mills Company pay any money to the Commercial Credit Company of Baltimore on account of the invoice of $9,225.00 dated August 29th, 1918—yes or no?

A. Yes, sir.

Q. Do you recall how much was paid? I think you have already testified that there was paid $1,894.52, is that right?

A. Yes, sir.

287 Q. What became of the merchandise which had been rejected by the American Mills Company of the merchandise covered by invoice of Aug. 29th, 1918?

A. That was returned to the Commercial Credit Company as per their orders.

Q. Did they accept that merchandise?

A. Yes, sir.

Q. You have already testified that merchandise was returned because it was not up to specifications, is that correct?

A. Yes, sir.

Q. Did you receive a letter from the Commercial Credit Company under date of Dec. 2nd, 1918?

A. We received a letter from the Commercial Credit Company dated Dec. 2, 1918.

Q. Read it.

A. Yes, sir.

"Amercian Mills Company,
Atlanta, Ga.

GENTLEMEN:

Re Hartenfeld Bag Company, Chicago.

We are in receipt of your favor of the 29th ultimo, and found enclosed your check for $1,894.52, which you intended in settlement of the goods you have accepted out of the shipment of $9,225.00, but as we are not familiar with the various deductions you have made, we are submitting the statement for the attention of the Hartenfeld Bag Company and in the meantime are applying your check on account.

As the 50,000 bags you rejected are our property, by virtue
288 of an assignment, we would like to know whether you would be interested in accepting this shipment if we were willing to make a reduction in the price of the goods, but as we are not familiar with the quality of the bags, if you would be interested in accepting same at some slight sacrifice, name the figure, and if your offer is an equitable one, we may consider accepting same, sooner than have these goods returned to Chicago for resale.

Thanking you to hold the goods for our account, and awaiting your reply, we are,

Yours very truly,

(Signed) J. J. WALSH,
Assistant Treasurer.

J. J. M./M."

Q. That letter——

A. It was replied to by the American Mills Company, as follows:

"Commercial Credit Company,
Baltimore, Md.

GENTLEMEN:

Re Hartenfeld Bag Company.

We have for acknowledgement yours of Dec. 2nd.
We have examined 32,500 of the 50,000 bags, and we would not be interested in purchasing these bags at any price. These bags are a class of merchandise which we cannot handle at all.
289 We have no customers who would be interested in purchasing them.
We have stored these bags in the ware house of the Morrow Transfer & Storage Co. for your account, and we suggest that you authorize us to have them insured.
We enclose you copy of letter written to Hartenfeld on the 6th.
Yours very truly,

AMERICAN MILLS CO."

Q. Was there a great demand in the month of September, 1918, for bags and for burlap of the kind and character which you had purchased from the Hartenfeld Bag Company and which the Hartenfeld Bag Company had not delivered?

A. Yes, sir.

Q. What were those bags in demand for in the month of September to be used for?

A. They were in great demand to be used by oil mills and they had to have the bags.

Q. What did they ship in those bags?

A. Cotton seed meal, cotton seed hulls, cotton seed cakes, in the different classes bags.

Q. Again referring for a moment to American Surety Company Exhibit 2 of Sept. 26th, 1919—did any part of the total of that statement include any money represented by the account of August 29th, assigned to the Commercial Credit Company?

A. No.

Q. Did the Hartenfeld Bag Company on Oct. 3, 1918, or at any other time, pay to American Mills Company any money with
290 which the American Mills Company was to pay the Commercial Credit Company the assigned account?

A. No.

Q. Did the Hartenfeld Bag Company on Oct. 3rd pay to the American Mills Company money with which to pay Foreman Brothers Banking Company to take up American Surety Company Exhibits 15 and 14—the notes in question?

A. Yes, sir.

Q. You testified before Percy Adams, Referee in Bankruptcy, Atlanta, Ga., on or about Feb. 6th, 1919, did you not?

A. Yes, sir.

Q. That was in the matter of an ancillary bankruptcy proceeding against the Hartenfeld Bag Company, was that right?

A. Yes, sir.

Q. Do you recall at that hearing Mr. A. C. Rowe, who represents the American Surety Company here, upon the taking of these depositions, appeared as one of the Attorneys for the Central Trust Company of Illinois as Trustee in Bankruptcy of the estate of Hartenfeld Bag Company?

A. Yes, sir.

Q. Do you recall that at the hearing before Mr. Adams you testified that after the American Surety Company's bond was delivered to you that you went back to Atlanta?

A. Yes, sir.

Q. Do you remember this question being asked you—"then you came back to arrange the details?" Do you remember that?

A. Yes, sir.

Q. And do you remember that you gave this reply: "I did not have the money. I don't carry $22,000.00 in my pocket?"

A. Yes, sir.

Q. Do you remember this question then being ask you:
291 "When he had arranged to pay you the contracts?" Do you remember that?

A. When he had what?

Q. "When he had arranged to pay you the contracts?"

A. Yes, sir.

Q. And that you answered: "So I paid him $22,100.00 in cash, which I did as soon as I could. I came back home and got the money and paid him $22,100.00 and he paid me $21,087.20."

A. Yes, sir.

Q. "I paid him in advance for the bags I was to get."

A. Yes, sir.

Q. Do you remember this question then being asked you: "What bags did you pay him for?" Do you remember that question?

A. Yes, sir.

Q. Do you remember that you gave him this reply: "I bought $22,100.00 worth of bags." Is that correct?

A. Yes, sir.

Q. Do you remember then this question being asked: "When did you buy them?" and that you replied: "I bought them on Sept. 27th, and the bond was issued on Sept. 28th."

A. Yes, sir.

Q. Do you remember then this question being asked: "You mean you paid him for a debt you had against him?" and you replied: "I did not so consider it."

A. Yes, sir.

Q. Do you remember this question was asked you upon that hearing: "Mr. May, have you told us everything you did in the two days you were in Chicago the first time when you got there on September 27th?" Do you remember that question?

A. Yes, sir.

Q. And that you gave this reply: "All I did was when
292 I got in communication with Mr. Hartenfeld, who is quite a busy man, and he spoke to me and told me how this error occurred; that there was no excuse for it; that it was a bonehead

error of his bookkeeper and everything was all right; that he was in business; that he had bags on hand and could sell them to me, and told me at the time, "I can give you a surety bond. I am doing it for others, and if you have got any doubt," that he will give me surety bond. We wrote up contract and submitted the contract to the Surety Company and the Surety company accepted the contract the next day." Do you remember that answer?

A. Yes, sir.

Q. Do you remember that Mr. Conyers, on re-direct examination asked you this question upon that hearing: "Is it true that you gave them the $22,100.00 check to furnish them the money to pay you the $21,087.20 which they owed you? Did you give them that $22,100.00 check to furnish them the money to pay you the debt of $21,087.20?" Do you remember that question being asked?

A. Yes, sir.

Q. Do you remember this reply was given by you: "I will answer you that question when I get the contract. I bought the bags and agreed under the contract to pay him $22,100.00, which he was to deliver, and then he paid me the $21,087.20."

A. Yes, sir.

Q. Previous to your paying the Hartenfeld Bay Company $22,100.00 Mr. Hartenfeld told you, I believe you testified, that the Hartenfeld Bay Company was short of money and long on merchandise, is that right?

A. Yes, sir.

293 Q. You knew, did you not, that when you paid the $22,100.00—the American Mills Company to Hartenfeld Bag Company, that the Hartenfeld Bag Company would have money in its possession sufficient to pay the American Mills Company what it owed the American Mills Company, did you not?

A. I knew that would take care of our claims.

Q. I am just asking you whether you knew?

A. Yes, sir.

Q. You testified that you agreed with Mr. Hartenfeld on or about Sept. 27th, 1918, that the American Mills Company and Hartenfeld Bag Company would begin all over again in its business relations, is that right?

A. Yes, sir.

Q. You relieved, did you not, the Hartenfeld Bag Company, all its preexisting obligations to ship merchandise upon the signing of the agreement of Sept. 27th, 1918?

A. Yes, sir.

Q. And the only thing that remained open after that date was the money owing by the Hartenfeld Bag Company to the American Mills Company, is that not true?

A. Money and the surety bond.

Q. Yes; in order to start all over again it was necessary that the Hartenfeld Bag Company pay its indebtedness to the American Mills Company, was it not?

A. Yes, sir.

Q. And it was pursuant to that agreement with Mr. Hartenfeld

that Mr. Hartenfeld caused the Hartenfeld Bag Company to pay the American Mills Company $21,087.20, is that right?

A. That was the understanding.

294 Redirect examination.

Questions by Mr. Rowe:

Q. You told us on your examination, Mr. May, that these two notes, Surety Company Exhibits #15 and #14, aggregating $9,135.08, were delivered in payment of the invoice of Aug. 29th, amounting to $9,225.00. What is the difference between the amount of the invoice and the aggregate of the notes represented?

A. I can figure out on a piece of paper. What is that now? (Figured) $89.92.

Q. What does that represent?

A. That represents, to the best of my recollection, the interest on notes that we had paid upon which he had not as yet delivered the merchandise.

Q. Does it not represent deduction of interest on the $9,225.00, between the date of the giving of the notes and the date when the account was due, 90 days after shipment?

A. No, sir.

Q. You are sure about that?

A. Yes, sir.

Q. You also told us on cross-examination, that Mr. Hartenfeld said that he wanted to settle up and cancel all prior defaults on his part and then start business afresh or like afresh or something of that kind, that he could satisfy you, give you a bond of $50,000.00 if necessary, and thereafter American Surety Company Exhibit #20 was prepared, Exhibit #20 being this draft of contract; have you told us everything which took place between the statement of Mr. Hartenfeld that he wanted to settle up everything and start afresh and the dictation or preparation of Exhibit #20?

A. I think I have.

295 Q. You have no recollection at the present time of any intervening conversation or transaction between Mr. Hartenfeld's declaration that he wanted to settle up things and start afresh and the preparation of Exhibit #20?

A. No.

Q. Your recollection is, at the present time, that that was the sequence of events, then Exhibit #20 was prepared, that this is the next event in the course of the transaction after Mr. Hartenfeld had told you that he wanted to start afresh?

A. You see the original of the contract—that memorandum contract was given to me without the writing; so the next process would naturally be handing it to me.

Q. But before that was given you, not after it was given you?

A. You mean before?

Q. Yes.

A. Well, we evidently discussed it and then he drew up that contract.

Q. Well, now do you remember what the discussion was?

A. Mr. Rowe, I would have to go back and repeat the same thing I have repeated.

Q. In other words, you can't recall anything more than you have told us?

A. Nothing in addition—no, sir.

Q. Do you remember testifying on your examination before Mr. Adams as follows:

"Q. What is that invoice?
A. It is $89.19 interest on two notes.
Q. For how long?
A. The original invoice was sold to us on 90 days terms.
Q. And this $89.19 is what?
A. This is $89.19 interest for the 90 days the way we figured it."

Do you remember so testifying?

A. If I testified that, it is an error.

296 Q. Well, you remember so testifying?

A. I guess it is so.

Q. You think you did so testify?

(No answer.)

Q. Do you remember this question and this answer to it: "What did you find out?"

A. I saw Mr. Hartenfeld and asked him about this particular transaction, and he said it was a mistake of his bookkeeper and that everything was all right. I particularly asked him about his standing, and he gave me his financial statement and he enjoyed a wonderful reputation all over. He told me it was a mistake. He did not know how it occurred, but it was a mistake of his bookkeeper, Mr. Simon.

Q. If you knew he had such a wonderful standing, if you knew he had such a financial statement, and if you knew it was a harmless mistake, using your notes and account too, why did you take a trip to Chicago?

A. I don't know what you call a prudent business man, but the burlap situation was very acute and I wanted to find out the situation. He satisfied me, and when talking to him about it he said: "I have not the money to pay you, but I have got the merchandise and I can give you all the merchandise you want, but if you have any doubt as to whether I can deliver, I will satisfy you about it." Do you remember those questions and those answers?

A. I do not recall them, but I guess they are there.

Q. Well, if they are there the questions and answers are correct, are they not?

A. Yes, sir.

Q. Do you remember also the following questions and answers:

"Q. What other goods were you talking about he had in
297 stock there?

A. He said he had other merchandise and he could let me have it.

Q. For what?
A. He said if you have any doubt about my responsibility I have got the goods, I have not any cash, but in sixty days I will be coming with money." Do you remember that?
A. Yes, sir.
Q. These questions and answers (page 22):

"He owed you around $20,000.00 and was to pay this by shipping bags to you?
A. The first time he did not owe $20,000.00. This first transaction in August of $9,225. We had given him notes for that, so that would have made his indebtedness about $12,000.00.
Q. But when you put the account the Commercial Credit Company of Baltimore had in with what he owed you it would amount to around $21,000.00, and that he was to pay you by shipping you bags?
A. That is correct."

Do you remember that testimony?
A. I remember the testimony. He was to ship the proper kind of bags.
Q. But you remember in substance testifying as I have read?
A. Yes, sir.

Redirect-examination.

Questions by Mr. Moore:

Q. The $21,087.20 did not include any money owing to the Commercial Credit Company of Baltimore, did it?
A. No, sir.
Q. What did you have to do with the giving of the notes, American Surety Company Exhibits 15 and 16? You had nothing to do with that transaction, did you?
A. No, sir.
Q. Did you figure out the difference between $9,225.00 and the aggregate of these two notes, $9,135.08 at the time these notes were issued?
A. Nothing at all.
Q. When you were testifying to the $89.92 were you testifying as information which you have or were you making a guess at it?
A. Well, when I testified before I presume I was guessing. When I testified in front of Mr. Adams I must have been guessing.
Q. The testimony then on that subject, before Mr. Adams, was incorrect, was it not?
A. Yes, sir.
Q. The $89.92 you have ascertained since, have you not, represented interest on the two notes which the American Mills Company had issued in payment of 50,000 inside cotton bags at 30½c., aggregating $15,250.00, which bags had never been delivered to the American Mills Company, is that right?
A. Yes, sir.

Q. These notes matured on August 5th, and August 20th, 1918, did they not?
A. Yes, sir.
Q. And they were paid, were they not?
A. Yes, sir.
Q. By the American Mills Company?
A. Yes, sir.
Q. Did the American Mills Company pay interest on those notes?
A. I do not recall.
Q. When they paid them?
A. I do not recall.
Q. The Hartenfeld Bag Company had the use of that money, did they not, during the time when the notes were outstanding?
A. Yes, sir.
Q. And the $15,250.00 was paid back to American Mills
299 Company on or about Sept. 14, 1918, at the time when the Hartenfeld Bag Company issued its check for $2,726.41, was that right?
A. Yes, sir.
Q. On that date the American Mills Company issued two notes, which aggregated $9,135.08, is that right?
A. Yes, sir.
Q. And the $9,135.08, representing the $9,225.00 which the American Mills Company owed the Hartenfeld Bag Company for invoice of August 29th, less $89.92 interest on the note, aggregated $15,250.00; is that right?
A. Yes, sir.

Further examination.

By Mr. Rowe:

Q. Mr. Witness, yesterday you testified you did not know what those notes aggregating $9,135.08 were given for, and to-day you testify they were given in payment of invoice of Aug. 29th. What has caused your knowledge to improve on that subject?
A. By refreshing my memory.
Q. You also corrected your testimony in regard to the $89.92 being interest on two notes, what was it that refreshed your recollection? The statement of your counsel here on this hearing?
A. I don't think that is a fair question.
Q. All right, put down the answer, Mr. Commissioner, as the witness gave it.
A. I got it from memoranda that we had.
Q. You have testified, in response to a question by your counsel, that your evidence given before Mr. Adams as to this $89.92 was guess; was any of the rest of your testimony given before Mr. Adams a guess also?
A. Mr. Rowe, I don't know——
300 Q. Were you supposing anything?
A. I can't answer the way you want me to, I will have to answer my way. I don't look after the figures in our business, we have some one who does look after that.

Q. But you did not tell Mr. Adams that, did you?
A. Well, I thought when I answered it, I was answering correctly, but I found later that I was mistaken.
Q. But in response to a question of your counsel, you said it was a guess, must have been guess?
A. Well, that is a mistake, isn't it? I call that a mistake.

HERBERT J. HAAS, sworn as a witness on behalf of American Surety Company of New York, plaintiff, having been duly sworn, testified by deposition, as follows:

Direct examination.

Questions by Mr. Rowe:

Q. Where do you live?
A. Atlanta.
Q. You are a member of the Georgia bar?
A. Yes, sir.
Q. In September and October, 1918, you were counsel for the American Mills Company, were you not?
A. Yes, sir.
Q. And you are attorney of record for American Mills Company in the suit now pending in Fulton Superior Court against the American Surety Company?
A. Yes, sir.
301 Q. And are associate counsel with Moses, Rosenthal & Kennedy in the suit pending Cook County, Illinois?
A. Yes, sir.
Q. You know Mr. May who is on the witness stand?
A. Yes, sir.
Q. Did you ever meet E. J. Hartenfeld?
A. Yes, sir.
Q. More than once?
A. Yes, sir.
Q. When was the first time you ever met him?
A. I met Mr. Hartenfeld in Atlanta, I think about two years ago; I cannot tell the exact time. I met him at the home of Mr. Strauss.
Q. When did you last see him?
A. The last time when I saw him was when he testified on the stand.
Q. Well, prior to that?
A. The last time I saw him was on October 3rd, 1918.
Q. And between October 3rd, and August 12th, you have not met him?
A. No, sir.
Q. That is to say, October 3rd, 1918, and August 12, 1919?
A. No, sir; I have not seen him.
Q. You went from Atlanta to Chicago about the 1st or 2nd of October, 1918, with Mr. May, the last witness?

A. Yes, sir.

Q. When did you get to Chicago?

A. We got to Chicago on the morning of October 3rd.

Q. Now confining yourself to occasions when Mr. Hartenfeld was present, just tell what took place?

A. Well, it was some time in the forenoon, I think perhaps about 10:30 or a quarter to eleven, I am not sure about the hour, Mr. May and I went to Mr. Hartenfeld's office——

Q. In the Kimball Building?

A. In the Kimball Building. Mr. May stated to Mr.
302 Hartenfeld that he had brought with him a check for $22,100.00 to pay the purchase price of goods purchased under the contract.

Q. What did Mr. Hartenfeld say?

A. He said he was ready to take it.

Q. Did he say anything else?

A. I was just going to tell you. Mr. May also stated that he brought with him a statement of the account that the American Mills Company then had due by Hartenfeld Bag Company to American Mills Company. Mr. Hartenfeld stated that he was ready to adjust them. As soon as I heard that——

Q. The statement which you refer to is American Surety Company's Exhibit No. 2, is it not?

A. Yes, that is the statement.

Q. Well, go on?

A. As soon as Mr. Hartenfeld stated that, I stepped outside of the private office and dictated a receipt to be given to the American Mills Company by the Hartenfeld Bag Company for $22,100.00. It took the young lady, who was not an expert stenographer, some time to get it done, and I waited there with her while she wrote it out. That perhaps took ten minutes. When I went back in there we discussed this item on that receipt about the Stein Company, and Mr. Hartenfeld stated that he thought Stein & Company were trying to take advantage of him and that he would not pay that item, but if those goods were shipped back to him with draft attached, he would pay the draft and take the goods back. When I brought the receipt back into the office—I have it here in my pocket if you would like to see it (exhibiting).

303 Q. I would like to see it.

A. Yes, very glad to show it to you.

Q. This was prepared by you?

A. Yes, sir.

Q. And was signed by Mr. Hartenfeld?

A. Yes, sir; the check was presented to him and he signed this receipt.

Q. Where did he sign it?

A. At Mr. Hartenfeld's office, and delivered to him there—delivered by him there to us.

Q. You notice the signature is with green ink?

A. This is signed in green ink.

Q. There has been some discussion as to whether there was any

green ink in Mr. Hartenfeld's office; are you satisfied there was green ink there?

A. Well, if this is green ink, I am satisfied—I presume it was, yes. That receipt was signed there.

Q. And what took place next?

A. Just about that time I presume, I can't give it to you in the exact sequence, they finished the discussion about the account and Mr. Hartenfeld stated that he was ready to give a check for it.

Q. Who wrote out the check?

A. Mr. Hartenfeld.

Q. And signed the receipt—the paper that you have there in your possession?

A. I think that is the paper.

Q. This is Exhibit No. 2.

A. Yes, sir; Mr. Hartenfeld then suggested that we all walk around to Foreman Brothers' Bank.

Q. Mr. Hartenfeld had the paper and check?

A. Yes, sir.

Q. And is that the check which was produced on the hearing in Chicago?

A. Well, I did not examine the one produced on the hear-
304 ing, but if you show me a copy of it——

Q. Look at this (exhibiting).

(The witness is shown American Surety Company's exhibit 23.)

A. Well, as near as I recall, I will say that it looks like it, but I can't, of course, say whether that is the check.

Q. And then after this check was drawn by Mr. Hartenfeld in his office, and the draft signed by Mr. May also in Mr. Hartenfeld's office, what took place then?

A. Well, as near as I can recall, we went over to Foreman Brothers' Bank at Mr. Hartenfeld's suggestion.

Q. Who took the papers?

A. My recollection is that Mr. May took the receipt with him—this receipt.

Q. Exhibit 2?

A. Whatever the number is. I had this receipt.

Q. You had the receipt that you had prepared and which had been signed by Hartenfeld Bag Company?

A. Yes, sir; and the check had been delivered to Mr. Hartenfeld, and Mr. Hartenfeld stated that he wanted us to meet Mr. Neise, the Vice-President of the Bank.

Q. And what was done with the check, exhibit 23, which Mr. Hartenfeld had prepared to the order of the American Mills Company?

A. Mr. Hartenfeld had the check. I presume he was getting it certified. I did not watch him.

Q. He subsequently produced it with the certification on it?

A. Yes, sir.

Q. And was it delivered to either you or Mr. May?

A. Delivered to Mr. May.

305 Q. And then, I presume, Mr. May turned over exhibit 2?

A. Yes, sir.

Q. And then, I presume, you parted, did you?

A. Well, I think we talked there—no, we did not part. Mr. Hartenfeld invited us to go to lunch with him, and I told him that I had made an engagement to meet some of my relatives. My father-in-law was there, and I met my father-in-law, and my father-in-law, Mr. May and I had lunch together there. I was very anxious to get out to Wilmette, which is a suburb of Chicago, and Mr. Hartenfeld volunteered to take me out in his automobile; it is a distance of about 22 miles from Chicago, and he subsequently called by the Hotel LaSalle and my father-in-law and I got into the car with him and Mr. Hartenfeld drove, with Mr. Simon in the front of the car—Mr. Hartenfeld's family were living out in that direction, and he got out of the car, and we parted at his home—said good-bye.

Q. And you didn't see him again until you saw him in Chicago on the 12th of August of this year?

A. No, sir. There is one other matter that I would like to state.

Q. Well, let us have it.

A. When the transaction was concluded at Mr. Hartenfeld's office, just about the time it was concluded, Mr. May stated to him: "Now, Mr. Hartenfeld, in reference to car of August 29th, the account on which has been assigned to the Commercial Credit Company, I want it distinctly understood that I am only to pay the value of that invoice. A casual examination of the merchandise has

306 shown that it is not right." Mr. Hartenfeld turned to him and assured him that a careful examination would prove that it was all right, and Mr. May stated to him: "Well, if it is all right, if it is in accordance with the contract, I will pay the $9,225.00."

Q. Will you kindly read into the record the receipt which you prepared at the office of Mr. Hartenfeld on October 3rd?

A. — "October 3rd, 1918.

Received of American Mills Company the sum of $22,100.00 in full of purchase price for merchandise by said American Mills Company from Hartenfeld Bag Company under contract dated September 27th, 1918.

(Signed) HARTENFELD BAG COMPANY,
E. J. HARTENFELD,
President."

SAMUEL LOVITT, sworn as a witness on behalf of American Surety Company of New York, plaintiff, having been duly sworn, testified by deposition, as follows:

Direct examination.

Questions by Mr. Rowe:

Q. Where do you live?

A. 928 Piedmont Avenue, in Atlanta.

Q. What is your connection with the American Mills Company?
A. Manager of the burlap department.
Q. How long have you been so connected?
A. Four and a half years.
307 Q. Do you know E. J. Hartenfeld of Chicago?
A. I do.
Q. How long have you known him?
A. About five years.
Q. I show you photostatic copy of a letter dated July 24th, 1918, addressed to Hartenfeld Bag Company, Chicago, Ill., and ask you if you dictated the original of that?
A. Yes, sir.

(Letter identified by witness, received in evidence, marked Plaintiff's Exhibit 30, of Sept. 27, 1919.)

Q. I show you copy of a letter dated August 13th, 1918, addressed to Hartenfeld Bag Company of Chicago, and will ask you if you dictated the original of that letter?
A. There is an error in this letter. It is not an exact copy of the original.
Q. What is that?
A. In the original that was stricken out, 100 bales instead of 100,000.
Q. If I told you that was a photograph of the original, would you still be of that opinion?
A. I made the change myself. It might have been changed after the original letter was received at the other end; it might have been changed. I remember changing that letter from 100,000 bags to 100 bales.
Q. With the exception of bags and bales, it is a correct copy of the letter, isn't it?
A. No, that would be 100,000 bales.
Q. With the exception of changing that 100,000, it is correct?
A. Well, I am telling it my way.
Q. Well, please answer my question. With the correction of 100 bales, that is a copy of the letter you dictated and sent?
A. It is.

308 (Letter identified by witness, received in evidence and marked Plaintiff's Exhibit 31, of Sept. 27, 1919.)

Q. I show you photostatic copy of a letter dated August 23rd, 1918, three pages and I will ask you to look at that and state whether you remember dictating it and signing it and sending it to Hartenfeld Bag Company at Chicago?
A. This is a letter that I dictated.
Q. You notice some handwriting on the third page, is that your handwriting?
A. It is.

(Letter identified by witness, received in evidence and marked Plaintiff's Exhibit 32, of Sept. 27, 1919.)

Q. You were in Chicago September 14th, 1918?
A. Yes, sir.
Q. Who was with you?
A. Mr. Strauss.
Q. Did you see Mr. Hartenfeld about that date?
A. I did.
Q. Now just tell us what took place, to the best of your recollection?
A. We went to Mr. Hartenfeld's office, and I went there to find out when he was going to deliver bags to us which were due us.
Q. What did you say to him?
A. I just talked to him generally on the subject of when he would deliver the bags and asked him how soon we might expect the bags due us.
Q. What did he say to that?
A. He promised to ship them.
Q. Well, what happened after that?
A. After that I went—I went out of his private office and Mr. Strauss was in there with him going over the account.
309 Q. Were you present when he and Mr. Strauss were going over the account?
A. No, I went out of the private office.
Q. And when did you see them again?
A. When Mr. Strauss had finished.
Q. And then what took place in Mr. Hartenfeld's presence?
A. We drove down town in his automobile and he drove us around Chicago, showing us the town, and during our conversation, while in this automobile, he was telling Mr. Strauss and I that he would like to have the American Mills Company go into business with him—not go into business with him, but that he would like to invest $100,000.00 in cash to go into the bag business in San Francisco, open up a bag plant in San Francisco, and he asked me how I would like to manage a plant. He said if I would go with him in the next three months he could put up $100,00-.00 in cash.
Q. Well, were you present at any time, Mr. Lovitt, when the question of giving the notes by the American Mills Company or by Hartenfeld Bag Company, was discussed by either Mr. Strauss or Mr. Hartenfeld?
A. No, sir.

Cross-examination.

Questions by Mr. Moses:

Q. I show you photostatic copy of a telegram dated September 12th, 1918, American Surety Company Exhibit 13, and ask you whether you ever saw the original of that telegram?
A. Yes, sir.
Q. Was that the telegram which said, among other things, "Suggest Lovitt coming to Chicago to adjust all matters," that
310 caused you to go to Chicago and arrive there on September 14th?

A. Yes, sir.
Q. Did you respond to that telegram, American Surety Company's Exhibit 13?
A. Yes, sir.
Q. What did you say in response to that telegram?
A. "Will see you in Chicago Saturday morning."
Q. Who was that addressed to?
A. E. J. Hartenfeld.
Q. And signed by whom?
A. S. Lovitt.
Q. That is yourself?
A. Yes, sir.
Q. On the same day that you sent that last wire, did you receive any further communication of any kind from Hartenfeld?
A. I got an answer.
Q. What did he say?
A. —

"Your wire. Get all memoranda of insides and other bags. If you arrive Saturday night will be glad to meet you."
(Signed) E. J. HARTENFELD.

Q. What memoranda of insides and other bags did Mr. Hartenfeld refer to in that telegram?
A. Well, he owed us a lot of inside coffee bags.
Q. And other bags.
A. And he owed us 30,000 one hundred and forty pound jute flour bags to be shipped to Baltimore, and there were several other adjustments to be made of bags that he had not shipped to various points.
Q. Then the memoranda that he referred to were bags, inside bags and other bags which he owed the American Mills Company on uncompleted contracts, is that right?
A. Yes, sir.
Q. You were at Mr. Hartenfeld's office in the Kimball
311 building on September 14th, 1918, in response to his request to be there, is that right?
A. No, I was not in the Kimball Building.
Q. You were at 312 N. Carpenter street?
A. Yes, sir.
Q. That is the office of the Hartenfeld Bag Company?
A. Yes, sir; the Hartenfeld Bag Company.
Q. Were you present at the time when Mr. Strauss executed and delivered American Surety Company's exhibits 14 and 15?
A. No, I was not in his office at that time.
Q. Did you see them on or about September 14th?
A. I seen the notes afterwards.
Q. On or about September 14?
A. Yes, sir.
Q. In the office of the Hartenfeld Bag Company?
A. No, Mr. Strauss—yes, in his place, but not in the same office—outside.

Q. At the Hartenfeld Bag Company?
A. Yes, sir.
Q. Were you present at any time when the amounts of those notes were arrived at?
A. No, sir.
Q. Have you got any financial interest in the American Mills Company as stockholder?
A. Yes, sir.
Q. Did you, prior to September 14th, or thereabouts, enter into any enterprise with Hartenfeld—E. J. Hartenfeld—invest any money in any enterprise?
A. Yes, sir.
Q. What enterprise?
A. Well, I bought 500 shares of stock in the St. Clair Mining & Milling Company.
312 Q. How much did you pay for those 500 shares?
A. Well, the first 500 shares I bought, I had done some work for Hartenfeld, I went to Philadelphia and bought a lot of stuff for him, and he gave me that 500 shares, and I paid the American Mills Company—it belonged to the firm because I was on their time—and I gave the American Mills Company, I think, $250.00, I am not sure, but afterwards, about two months, possibly in July or August, 1918, knowing how good Hartenfeld was and feeling he was so strong financially, and the mine was such a wonderful thing it was going to make them all so rich, I bought—I paid $1,200.00 in cash for 1,500 more shares.
Q. Who sold those shares to you?
A. Mr. E. J. Hartenfeld, for cash.
Q. Did you purchase for the American Mills Company the merchandise described in the invoice of August 29th, 1918, amounting to $9,225.00, which was represented by American Surety Exhibit No. 11?
A. Yes, sir.
Q. Was that done by telephone?
A. Yes, sir.
Q. Was there a telephone conversation between you and Mr. Hartenfeld?
A. No.
Q. Between you and who?
A. Mr. Simon.
Q. Mr. Simon, of the Hartenfeld Bag Company, is that right?
A. Yes, sir.
Q. Was anything said in that conversation to the effect that that merchandise was to be subject to inspection?
A. Yes, sir.
Q. What was said on that subject?
A. That shipment was bought with the understanding that
313 there was to be 30,000 jute flours shipped before that; it was bought with the understanding that he would ship 30,000 jute flours and also we were to get terms of 90 days and subject to inspection. We had the right to go over that lot of bags and reject

them if they were not satisfactory.

Q. Where were the jute flour bags to be sent to?

A. They were to be shipped to the Miller Fertilizer Company of Baltimore, Md.

Q. Were they ever shipped?

A. Not by the Hartenfeld Bag Company.

Q. Mr. Hartenfeld never performed that agreement to ship those jute bags, did he?

A. No, sir.

Q. Was that under discussion—his failure to ship those jute flour bags—between you and Mr. Hartenfeld on or about September 14th, 1918, when you were in Chicago?

A. Yes, sir.

Q. What did he say then about those jute flour bags?

A. He said that due to a big large contract which he had with the Marine Corps, that he couldn't make the shipment at that time, that he was working on cement bags, and, as it was necessary to clean cement bags on a wheel to get the dust out of the same as for flour bags, that he couldn't lay the cement bags aside as it was for war purposes, it was a government contract.

Q. Did he say to you at that time that he would ship those jute flour bags as soon as he possibly could, or something to that effect?

314 A. Well, he promised that he would ship them in about seven days.

Q. Now, previous to that, on or about September 3rd, 1918, you wrote a letter, did you, to the Hartenfeld Bag Company about those flour bags and about the merchandise covered by the invoice of August 29th, 1918?

A. Yes, sir.

Q. What did you say in that letter?

A. —.

"We are in receipt of your letter of the 30th ult., and we wish to call your attention that according to the contract made with your Mr. Simon for those bags, it was distinctly stated over the telephone that these bags were not to be shipped until the car of jutes were first shipped, and there was no necessity for making this shipment. We do not need these bags, but need coffees and jutes. Besides this, we are having considerable trouble on the bags which you have already shipped us.

"The meal bags which you have already shipped us, we have shipped to the Stein Bag Company, and wish to state that as soon as this car comes in we are going over the entire car and any bags that are not satisfactory, we will expect you to pay the freight, labor, etc. We are sick and tired of this kind of business and we are going to cut it out as soon as we get clean.

Very truly yours,

AMERICAN MILLS COMPANY,

Per —— ——,

Mgr. Bag & Burlap Dept.

315 Redirect examination.

Questions by Mr. Rowe:

Q. Why did you go to Chicago to see him on the 14th of September?

A. To hurry the Hartenfeld Bag Company on deliveries.

Q. Wasn't Mr. Strauss able to do that?

A. Mr. Strauss is the bookkeeper and Secretary of the company, and I am manager of the burlap department and those are my duties at all times.

Q. So you thought it was necessary for you both to go?

A. Yes, sir.

Q. I show you a telegram dated September 27th, 1918, addressed to American Mills Company, Atlanta, which states: "Nothing accomplished as yet. Will wire late today or tomorrow definitely and hold commercial reply. (Signed) Armand May." Did you see that telegram about the 27th or 28th of September, 1918?

A. I did.

Q. That was sent by Mr. May in Chicago to the American Mills Company of Atlanta and at that time you were in Atlanta, were you not?

A. I was.

Q. To what did those words "and hold commercial reply" refer?

A. I don't know.

Q. Did they have any meaning for you whatever?

A. Commercial reply?

Q. Yes—I am asking if they had any meaning whatever at the time to you, about the 27th or 28th of September, 1918? An-

316 swer the question, if you please. (Question read over.) What is your answer?

A. I don't know.

Q. You mean you don't know whether they had any meaning or not?

A. Didn't have no meaning to me.

Q. When you were in Chicago at Mr. Hartenfeld's office and you went out of the room when Mr. Hartenfeld and Mr. Strauss were discussing financial matters, had either one of them requested you to leave the room?

A. No, sir.

Q. How did you come to go out?

A. Well, because I didn't know anything about the bookkeeping or the finances, etc., no interest in the financial end of the business; that was all between Mr. Strauss and Mr. Hartenfeld and I couldn't help them there and I went out of the office and talked to one of the boys in front.

L. G. STRAUSS, sworn as a witness on behalf of American Surety Company of New York, Plaintiff, having been duly sworn, testified by deposition, as follows:

Direct examination.

Question- by Mr. Rowe:

Q. Your name is L. G. Strauss?
A. Leo G. Strauss.
17 Q. Are you living in Atlanta?
A. Yes, sir.
Q. What is your connection with the American Mills Company?
A. Secretary and Treasurer.
Q. How long have you been so connected with it?
A. Since its organization, November, 1911.
Q. Do you recall going to Chicago about the 14th of September, 918, in accordance with the testimony of these other witnesses, Mr. trauss?
A. I remember going to Chicago in September—September 13th, 918, arriving in Chicago September 14th, 1918.
Q. What took place after you got there?
A. We arrived at Mr. Hartenfeld's office approximately at 9 'clock that morning. The train got in about eight, and he sent machine to the depot to meet us. Mr. Hartenfeld was quite busy, his being a Saturday, and he explained a good many people came n to see him and I told him to try to give us as much time as he ould because I didn't know how long our transaction would natur- lly consume and I was very desirous of leaving the same night and ad very little time to spare. Mr. Lovitt opened the conversation y referring to a number of contracts that the Hartenfeld Bag Com- any had undertaken and which were unfilled at that time, and he old him in very plain language that we were very much disappointed n the way he had treated us subsequent to our cancellation by not fulfilling his part of the agreement. He then said: "Gentle-
18 men,——"
Q. You mean Mr. Hartenfeld said?
A. Mr. Hartenfeld then said "Gentlemen, I am unable to deliver you, or your customers for your account 50,000 inside coffee bags hich I sold you and for which I have taken your notes, which otes you have already paid, but I authorize you to go out in the pen market and buy them and I will reimburse you for the differ- nce between the amount you paid me and the market price. That, n a way, was stated to both Mr. Lovitt and myself. We then got talking about a number of other undelivered goods, exactly which do not remember, having taken place over a year ago. I was very nsistent, however, particularly about the 9,000 bags to Macon which ere returned approximately in July to Hartenfeld on account of in- rior quality, and which we had repeatedly requested him to replace, nd that they had never done, and he at that time confessed that e didn't think he could. I also stated to Mr. Hartenfeld: "You ave been sending me a number of invoices, some of which I re- urned to you as incorrect. I know you have some accounts against which are not right and I want to go into this fully today while am here, because I leave town very seldom." We then started on

the adjustment of several matters, one of which was an allowance which was demanded by one of our customers, the Courteen Seed Company in Milwaukee to whom Hartenfeld for our account, made a shipment of bags several months before. The Courteen Seed Company had already paid us for this merchandise, the goods having been sold order notify, bill of lading attached. Therefore, payment was made by the Courteen Seed Company prior to the arrival of the merchandise. When the merchandise was received by the consignee it was found defective and they made a claim on us. That claim amounted to several hundred dollars. We got into communication by correspondence with Mr. Hartenfeld and the Hartenfeld Bag Company and requested him to make an adjustment. They claimed approximately $450.00 as an allowance. I told Mr. Hartenfeld that that matter had to be adjusted because, as far as we were concerned, we were put in a very bad light with our customer, the Courteen Seed Company, and at my suggestion he, from his private office, called up the manager of the Courteen Seed Company in Milwaukee, over long distance, and spoke to him approximately fifteen minutes. He offered him an allowance which subsequently was accepted by the Courteen Seed Company, of $230.00 which amount the American Mills Company was to send to the Courteen Seed Company in Milwaukee, the liability for which the Hartenfeld Bag Company acknowledged to the American Mills Company.

Q. Well, did you proceed to go through the accounts between the Hartenfeld Bag Company and the American Mills Company at that time?

A. Yes, sir.

Q. And did you arrive at any statement or settlement of account on that date, or any part of them?

320 A. Yes, sir; we arrived at a part settlement and accounting with them, with the exception of some certain matters which were then still to be held in abeyance.

Q. Will you please state what matters you arrived at a settlement on?

A. I would like to refresh my memory on that.

Q. I haven't the slightest objection to your so doing?

A. We agreed at that time that the Hartenfeld Bag Company was indebted to the American Mills Company $16,480.00, arrived at as follows: 50,000 inside coffee bags at 30½c. per bag, for which the American Mills Company had already paid, and which were never delivered, amounting to $15,250.00. The allowance of two cents a bag on 50,000 coffee bags which were purchased by the American Mills Company, which he authorized us to buy in the open market, totaled $1,000.00. Furthermore, the agreed allowance to the Courteen Seed Company, or agreement, of $230.00, making as stated above, a total of $16,480.00. He then presented to me a statement, which I knew before, showing what we owed him——

Q. How much does that amount to?

A. This statement is not added up in dollars and cents, but there are a number of items on there to which I did not agree, and some

items which were reduced by me by reason of the fact that they were incorrect. (Exhibiting.) Among a number of invoices that he presented to me, I finally agreed that we owed him for railroad claim $225.00; for freight charges $785.58; a shipment marked July 20th, 28,677 meal bags which he had originally put down at $2,- 728.01, which figure, however, were reduced to $2,[illegible]. That made a total of $4,528.59 which we owed him against $16,480.00 which he owed us leaving a balance due by Harrenfeld Bag Company to American Mills Company of $11,951.41.

Q. Does that balance of some four thousand and odd dollars to which you have just testified include the item of the invoice of $9,225.00 of August 29th which was not then due?

A. No sir.

Q. All right?

A. You don't want any explanation on that do you?

Q. Yes, any explanation you would like to make?

A. We did not consider at the beginning of the accounting the invoice of August 29th for $9,225.00 for the reason that that invoice was not due, in accordance with the terms shown on the invoice, until November 29th, this settlement having been arrived at on September 14th. When I showed Mr. Harrenfeld that the amount he owed us was $11,951.41 he said to me: "Well, we want to arrive at some kind of an adjustment on this. I can't give you this amount in cash, but I will give you part cash and part notes." I said that that was agreeable. Before we arrived at the amount of how much cash he should pay me and how much notes he should give me, he said "How about settling the car of August 29th which you bought?" I said "Mr. Harrenfeld, there is more than one reason why I wouldn't like to settle this car today. One reason is that we have 90 days in which to pay it, and another reason is it is subject to inspection. On the day that Mr. Lovitt and I left Atlanta for Chicago, September 12th, we hadn't received our notice from the railroad showing that the goods had come to Atlanta, and, therefore, we are unable to arrive at the amount of the merchandise if it had been properly checked and verified." He said: "You know I will make good any shortage or rejections which might be in this car. It will help me a lot if you will give me notes. You can make them as long as you want to, but you know, my bank considers your note like cash and I can use it like cash. I will even give you longer than 90 days if you will agree to give me the notes." I said: "I can't see any serious objection to that if you will positively indemnify me against any loss which may arise upon checking up the merchandise." He said: "You know I have always stood by my claims, and I shall do so in this instance." Then I said "How much are you going to give me in cash and notes?" He said: "I could give you around $9,000.00. If you want to, I will give you the same amount, $9,225.00,——"

Q. In notes?

A. In notes, and the balance in cash. Just at that time I said, "Mr. Harrenfeld, there is one thing that I forgot about: you owe me interest. He says: "What for?" I said: "For the amount

323 of $15,250.00 for which we gave notes in May and which were paid by us to the Bank on August 5th and 20th, in two amounts, in two equal amounts, of $7,625.00. We have not only put ourselves in a bad position with our customer in not delivering the bags, but in addition to that we have been out of our money without getting any bags. Do you think it is fair that the American Mills Company should pay out cash in August and on September 14th, not have any bags?" I think we are entitled to interest on that amount." He says: I think so too. Just take it off the note. Because the amount that he owed us at that time that hed been arrived at, $11,951.00, he says: "I don't want to disturb this, I will just take it off of the notes that you can give me for the car of August 29th. Take that off; figure out how much it is." I sat down and figured out how much the amount was, and my best recollection is it was $89.00 and some cents was taken off of the notes. He then gave me a check for $2,726.41, one note for $5,000.00 and one note for $4,225.00, making a total of $11,951.41 which was the exact amount as agreed upon in our settlement.

Q. Now, are these two notes which are American Surety Company's exhibits 15 and 14, the notes which you delivered to Mr. Hartenfeld at that time?

A. Yes sir, absolutely.

Q. And these represent then, as I understand it, the invoice of $9,225.00 of August 29th, which was not then due, and also

324 some interest charge and some other matter which was adjusted at the last moment?

A. Correct.

Q. And Mr. Hartenfeld gave you his notes for $9,225.00 and paid the difference in cash?

A. Yes, sir.

Q. So that if this bill of $9,225.00 for the invoice of August 29th had actually been due and the goods had all been delivered in accordance with the contract, and the money had been due at that time, he would have really owed you the amount which he then paid you cash, would he not? That is to say, the two sets of notes were practically for the same amount, were they not?

A. They happened to be the same amount for the reason that I have explained already, by his suggestion, after my acquiescing of giving him notes for an account which was not due yet, to help him out, in return. for which he said: "I will give you my notes for approximately the same amount."

Q. And the balance was paid in cash?

A. The balance was paid in cash.

Q. So that if your notes amounting to $9,135.08 were paid when due, and Hartenfeld's notes of $9,225.00 had been paid when due, and you had already gotten the difference in cash, it would have settled your adjustment of account on that date?

A. It would have wiped out the adjustment, yes, sir, if he had paid the notes when they became due, and we paid ours, which we did.

Q. And the balance as paid in cash would have settled the account as adjusted September 14th?

A. Yes sir.

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Cross-examination.

Questions by Mr. Moses:

Q. The notes, American Surety Company's exhibits 15 and 14, are notes that did not draw interest, is that right?

A. Correct, sir.

Q. Did you, subsequent to September 14, 1918, or the Hartenfeld Bag Company, send to the American Mills Company any invoices covering interest on these two notes, American Surety Company's exhibits 15 and 14?

A. They did, sir.

Q. What became of those invoices?

A. I returned the invoices with a letter.

Q. The letter that you have reference to is American Surety Company's exhibit No. 19-*a* is it not?

A. It is marked so, yes sir.

Q. Did the American Mills Company pay any interest on those notes?

A. No sir.

Q. Did the Hartenfeld Bag Company cancel the invoices referred to in American Surety Company's exhibit No. 19-*a*?

A. I presume so, because I sent them back with my letter asking them to cancel it and I never heard from him after that. I presume they cancelled the charge on their books against the American Mills Company, because I explained to them thoroughly that we didn't owe it.

Q. At the time of that adjustment on September 14th, did Mr. Hartenfeld promise you or Mr. Lovitt that he would ship the jute bags amounting to 30,000 in number?

A. Yes, sir; he promised to ship them within seven days.

Q. And what was, if you know, the contract price of those jute bags?

A. They were approximately $250.00 per thousand. They may have been $255.00, but it was in that neighborhood; around 25 cents a bag.

Q. They were to be shipped without a sight draft or bill of lading attached, were they?

A. Yes, sir.

Q. In other words, they were to be shipped, as you call it in the trade, open?

A. Yes, sir, open account.

Q. Subject to inspection?

A. Subject to inspection, correct.

Q. That amounted to how much?

A. I should say around $7,500.00 because a car of jute flour bags usually contains 30,000 more or less.

Q. Did he say anything to you on that day, to you or Mr. Lovitt, about shipping 25,000 coffee bags which he owed?

A. Yes sir.

Q. What did he state about that?

A. That he would ship at the very earliest possible moment, and he told us that he had a car of coffee bags in the yards in Chicago for which he had already paid, and had already paid the freight on it, but on account of the railroad congestion he was unable to get them in the warehouse for inspection and reshipment, at the time we were there, but it would be only a matter of a few days before the shipment would be made.

327 Q. And how much, in dollars and cents, at the contract price, would those 25,000 bags amount to?

A. Approximately $7,500.00. There were 25,000 bags which cost in the neighborhood of 30 to 32 cents apiece.

Q. On that day you cancelled his obligation, did you, to ship you 50,000 bags?

A. Yes, sir.

Q. And it was for that that he paid, or allowed the American Mills Company a credit of $1,000.00, was it not?

A. That was right.

Q. That credit was the difference between 30½ cents and 32½ cents—30½ cents being the contract price and 32½ cents the price the American Mills Company had to pay for those bags in the open market, is that right?

A. Correct, sir.

Q. Those 25,000 bags had not been paid for, had they?

A. No sir.

Q. But he was under contract to deliver them?

A. Yes sir.

Q. Was there any discussion on that day by Mr. Hartenfeld of his financial condition?

A. While I was in his office he had laying on his desk a check; as near as I can remember, a very large check, of some New York refining company, which I think was $8,000.00 or $8,100.00, payable to the order of Hartenfeld Bag Company; about 11 o'clock I said to him, in a playful way, "If you don't want this check I will take it. It seems you don't care about sending it to the bank, it is near closing time for the bank." He said, "Why, $8,000.00 don't make much difference in my bank account," and the check

328 was left on his desk. He further stated to me during the afternoon some time—he took us out driving in his automobile on Lakeshore Drive—that he was getting then to the point where he would be independently rich in a very short time; his mine was bringing in so much money that he thought of starting a business on the Pacific Coast, which he considered a fine location for a bag business, and he was willing to put up $100,000.00 to start that business. He took me to his club for lunch, a very fine club in Chicago, and from the people to whom I was introduced by him, I gained the impression that he was a very well-to-do man. In substance, I should say that I was more impressed with his financial ability to take care of his contracts at that time than ever before, although we had been dealing with him for five years and I had looked after the credits.

Q. Did he say in your presence, to Mr. Lovitt, that he would put

100,000.00 in a business to be started on the Pacific Coast, if the American Mills Company would put up an equal amount of money?
A. That conversation was between all three of us; we were all talking in the car.
Q. You heard that part of it?
A. I heard that part about $100,000.00 for the Hartenfeld Bag Company, but I don't remember his having asked the American Mills Company to put up an equal amount. I didn't think he needed that.

Q. Had you, on September 14th, any doubt of the ability of the Hartenfeld Bag Company to pay to the American Mills Company the notes aggregating $9,225.00, when they became due?

A. I did not have a serious doubt that he would take care of his notes because my recollection is he had never let one of his notes go to protest. He had always taken care of his notes. While he was negligent in filling contracts, he never would let any notes go to protest, because I usually sent them to his own bank for collection and he saw that they were taken care of. But in addition to that I felt that we had more security than that because of his promise to fill our contracts on jute flour bags and 25,000 coffees, which in round figures, amounted to $15,000.00, and I felt that when those goods were shipped on open account, if he did fail to take care of one of his notes, that we always had enough to fall back on to protect ourselves.

Stipulated that examination of Armand May taken in bankruptcy proceedings of the Hartenfeld Bag Company at Atlanta, February 6, 1919, be read in evidence.

Deposition of A. May.

In the District Court of the United States, Northern District of Georgia.

In Bankruptcy.

No. 6494.

In the Matter of HARTENFELD BAG COMPANY, INCORPORATED, Bankrupt.

Ancillary Petition to Petition in Bankruptcy of Record in United States District Court, Eastern Division of Northern District of Illinois.

Before Hon. Percy H. Adams, Referee in Bankruptcy, at Atlanta, Ga., February 6, 1919.

Colquitt & Conyers, Esqs., for Receiver in Bankruptcy of Hartenfeld Bag Co.
B. J. Phillips, for wjtness and American Mills Co.

Direct examination.

By Mr. Conyers:

Q. Your name is Armand May?
A. Yes, sir.
Q. How long have you lived in Atlanta?
A. Thirty-five years.
Q. What is your connection with the American Mills Company?
A. I am President.
Q. Where is the plant of the American Mills Company?
A. They have no plant.
331 Q. Where is their offices?
A. At No. 172 Marietta Street, Atlanta, Georgia.
Q. How long have they been located there?
A. They have been located in this place about six years.
Q. Prior to that time where were they located?
A. 71 South Pryor Street, Atlanta, Georgia.
Q. How long were they located there?
A. One and one-half to two years.
Q. Before that time where?
A. That was their first place.
Q. They have no plant at all?
A. No, sir.
Q. They are not manufacturers as their name imports?
A. We are now building our own mills.
Q. In the seven and one-half years of its existence it has never been a manufacturing establishment?
A. No, sir.
Q. You have never manufactured anything?
A. No, sir.
Q. Your business is that of a broker—part of it?
A. Our business is acting brokers, jobbers and selling agents.
Q. Just what do you mean by broker? What business do the American Mills Company do as brokers?
A. I guess the word "brokers" is hardly the proper term, the better designation you would possibly say would be commission merchants.
Q. Just explain how it does that?
A. On certain commodities we sell for commissions allowed us by the manufacturers, and other commodities we buy and sell.
332 Q. Any other commodities except these two?
A. That's all.
Q. Do you buy new goods or second-hand goods?
A. We buy new goods and second-hand goods.
Q. What was your connection—I mean American Mills Company—what was the connection of the American Mills Company with Hartenfeld Bag Company?
A. We bought goods from them.
Q. Did you ever sell for them on a commission?
A. No, sir.

Q. Did you ever buy any new goods from them?
A. Not that I recall.
Q. You are President of the American Mills Company and the ctive business head of it?
A. I am President and General Manager.
Q. What I mean is that you are the active business man in con-ection with the handling of the American Mills Company?
A. As a rule; that does not include every transaction, because I annot handle everything.
Q. Who is the man next in charge?
A. That depends on which department.
Q. What other departments have you?
A. Burlap department.
Q. Who is in charge of that?
A. Mr. Lovitt is the manager.
Q. Under you?
A. Yes, sir.
Q. What other departments?
A. Paper department.
Q. Who is in charge of that?
A. Mr. McGinty is manager of that. Then we have the Service Department which deals with shipments.
333 Q. Who is in charge of that?
A. Mr. Paul Talbot.
Q. Any other department?
A. No, sir.
Q. In all these you act as commission merchants, selling for a ommission, and you buy and resell?
A. Commission merchants and jobbers.
Q. When did your connection with the Hartenfeld Bag Company egin?
A. About seven years ago.
Q. Has it been continuous since that time?
A. Yes, sir.
Q. How much business have you done with them on an average er year, not including the year 1918?
A. I can only give you a guess on that.
Q. Give us a guess.
A. I imagine that the business has grown to $100,000.00 per ear.
Q. What was it during 1918?
A. I imagine about $100,000.00. That is a guess, but I think hat's about right.
Q. Have you refreshed your recollection?
A. No, sir.
Q. Have you not gone over your records since you were served ith the subpœna in this matter?
A. No, sir.
Q. Have you a memorandum showing your dealings?
A. We kept our books—We have no accounts payable. Our

connection with Hartenfeld in many instances we advanced him money on goods he had not actually delivered.

Q. For what?

A. Burlap. As you know burlap is a commodity that is
334 usually bought and sold for cash, and it requires a world of money to handle that business, and there were many times we would lend him money, or our paper, to buy those bags for us.

Q. Have you a record of those transactions?

A. I have. For example: This ledger sheet—these are not the original papers.

Q. Where are they?

A. They are in our books.

Q. What did you do when you advanced him money?

A. We just put it on the books. Here is an item of May 10, 1918, where we give him a note for $9,150.00.

Q. Was that an accommodation note?

A. No, sir. Here is where we kept a memorandum (pointing to copy ledger sheet.) We bought from him those bags and he was to deliver them against that, and as he delivered he would sent us memorandum invoices against the shipments.

Q. You mean you paid him in advance?

A. Yes, sir.

Q. Was that your regular course of business dealings with him?

A. We paid him in advance for a number of things whenever we wanted him to buy for us. Sometimes we paid him cash.

Q. Did you pay him these advance payments in cash or notes?

A. Sometimes in cash and sometimes in notes.

Q. Indicate on these which are cash and which are notes?
335 (Handing witness copy ledger sheets.)

A. On May 10, 1918, we gave him a note due July 20th for $9,150.00.

Q. Was that note payable to him?

A. Payable to the Hartenfeld Bag Company.

Q. And was that an advance to him?

A. Yes, sir.

Q. You owed him nothing at that time?

A. Not for that note. He might have owed us something for shortages in shipments or something of that nature.

Q. You owed him nothing when you gave him that note?

A. This note I am speaking about covers these bags which we paid for in advance.

Q. You had not gotten them?

A. No, sir.

Q. You did not owe him anything?

A. No, sir.

Q. If there was an indebtedness it was from Hartenfeld Bag Company to you for shortages on invoices?

A. Yes, sir, or sometimes we sold him a small item for twine which he used in his business.

Q. You gave him a note May 22, 1918, due August 5th for $7,625.00. What was that for?

A. That is a similar kind of transaction. When we sell those bags in order to insure delivery, because the market on burlap all this time has been unusual—has been higher than ever known—and this class of bags very hard to get, and we paid him in advance to get these bags for us. He acted as custodian of our funds in this case.

336 Q. You mean you gave him that note so he could discount that note and get the money on it and buy bags for you?

A. Yes, sir.

Q. Is that also true of the note due August 22nd?

A. Yes, sir.

Q. Were all three outstanding at the same time?

A. One was due July 20th, one due August 5th and one August 22nd.

Q. One was given him May 10th and two May 22nd?

A. That's right.

Q. So from May 22nd up to the 20th of July all three notes were in his hands?

A. Yes, sir, that's correct.

Q. You had to pay one of them in July?

A. Yes, sir.

Q. He did not take it up?

A. No, sir. It was our note.

Q. Had he shipped all the goods?

A. He had shipped up to—May 31st he shipped $2,745.00; May 31st $1,830.00, July 20th $4,270.00, and the next credit we have on his account is August 9th, "Cash $925.00."

Q. How came him to pay you back that money?

A. There was a shipment of $925.00 worth of merchandise which we had shipped him long previous which he claimed he had never received. We charged him for it and we put in a claim against the Transportation Company, and when the Railroad Company paid the claim we attached the Railroad Company's check to a draft for $925.00, which he paid.

337 Q. Were you indebted to Hartenfeld Bag Company at the time that $925.00 was paid?

A. No.

Q. Your indebtedness to them was more than covered by the notes?

A. I am not certain of the status, but——

Q. At the time you had not paid any notes except the first one of July 20th, is that true?

A. Yes, sir.

Q. So that he was indebted to you at the time. He was indebted to you at the time of this $925.00, and he paid you that on goods shipped him and not as a credit on money you had advanced to him?

A. When we got the check for this $925.00 it was in payment actually for goods we shipped to him about a couple of years previously.

Q. He had never gotten them?

A. He claimed he had not.

Q. Why did he pay the account?
A. Because the Railroad paid the claim to us.
Q. Then you collected it out of him again?
A. We took the check and sent it to him and he then paid us $925.00. We sent him the Railroad's check for $925.00 the amount of the claim.
Q. And he paid you back again?
A. I attached the Railroad's check to the draft, and I had my $925.00 and he had his.
Q. Now on September 10th there is an item for $1,525.00 what is that for?
A. That is five thousand (5,000) bags to Greenville; that is a shipment he made to Greenville that was not right and the difference in the price is 14½ cents per bag; that was a charge against
338 him.
Q. You charged him with this because the bags were 14½c below standard?
A. The bags were No. 2, instead of No. 1.
Q. Which was rebated for failure to deliver goods of the kind he had contracted to deliver?
A. Yes, sir.
Q. Was that part of this original contract you had with him when you gave that note?
A. Look on that slip and see if it says "Greenville."
Q. That series of three notes you say covers shipments made to these five different places, either consigned to you, or your order, and sold by you to people at those five different places?
A. That's right.
Q. They were shipped all the way from May 22nd down until the middle of August?
A. Yes, sir.
Q. These paid you for what you bought with notes given the preceding May?
A. That's correct.
Q. This $1,525.00 you charged it up to him, did you?
A. This is a credit of $1,525.00, not a charge. When he shipped the five thousand (5,000) bags, we credited him with $1,525.00, because that is the basis on which we purchased them.
Q. By that you mean 14½c rebate?
A. That had nothing to do with that charge of $725.00, because you mentioned 14½c.
Q. You misunderstood me, I was referring to the $1,525.00. That second credit of $1,525.00, what was that?
339 A. That was a credit for shipment of five thousand coffee bags.
Q. Just call those out, Mr. May.
A. He got the second credit of $1,525.00, July 20th $2,818.01 was for bags shipped—credit September 17th, cash $2,726.41.
Q. How was that paid?
A. That was paid in cash.
Q. Why did he pay you that much?

A. Mr. Strauss and Mr. Lovitt went to Chicago on September 4th if I am not in error, and probably made the settlement with him, and they gave one note due December 18th for $4,650.00, and on the same day gave him a note due on January 5th, for $4,485.08.

Q. Why were they giving him notes when he was indebted to you?

A. They were giving notes—I think that was in payment of certain invoices, if I am not in error that's payment for an invoice. I don't know what invoices they were. I think it is well to explain. I think that was in payment of invoice for that Commercial Credit Company charge of $9,225.00.

Q. When was that?

A. These notes were given on September 14th, and due December 18th and January 5th.

Q. You say they gave Hartenfeld Bag Company those notes to cover this indebtedness to the Commercial Credit Company in Baltimore?

A. Yes, sir.

Q. And they aggregate $9,225.00?

A. I think they aggregate $9,225.00, less the interest.

340 Q. That was in the middle of September?

A. Yes, sir, September 14th.

Q. What is that invoice?

A. It is $89.92, interest on the two notes.

Q. For how long?

A. The original invoice was sold to us on ninety days terms.

Q. And this $89.92 is what?

A. This $89.92 interest for ninety days the way we figured it.

Q. Those notes were delivered by Mr. Strauss and Mr. Lovitt when they were in Chicago, to the Hartenfeld Bag Company in payment of the invoice of Commercial Credit Company?

A. We did not know that it was the Commercial Credit Company. We only knew that as the invoice of September 14th. We knew nothing of the Commercial Credit Company except as a company that buys accounts without notice.

Q. Have you ever had dealings with them, the American Mills Company I mean?

A. No, sir.

Q. Did you ever have?

A. Not as the American Mills Company. As to Commercial Credit Company, I am familiar with that form of business because I know as a matter of fact and because the Commercial Credit Company in a circular letter I received from them a few days ago, did a business of fifty-five million dollars last year. They do a nation-wide business and they do business with firms rated from $35,000.00 to $1,000,000.00.

Q. You are familiar with their method of doing business?

A. Yes.

Q. And you are familiar with their rate, what they charge 341 for their accommodation?

A. Yes, sir.

Q. Very high rate?

A. One-thirtieth of one per cent per month. If you figure it out you will see.

Q. Is that the universal custom?

A. That is commercial credit rate, and I think every concern——

Q. Have you not known them to charge more than that?

A. Yes, sir.

Q. When was that?

A. Years ago.

Q. When was that?

A. Seven or eight years ago.

Q. Do you not know personally that they charged a good deal more than one-thirtieth of one per cent?

—. ——.

Q. Is it not true that the last personal knowledge you had of the method of doing business by the Commercial Credit Company of Baltimore was to the effect that they charged a great deal higher rate than one-thirtieth of one per cent?

A. No, sir.

Q. Did you not say that?

A. You said a "great deal."

Q. Well, a good deal more.

A. The difference is two per cent in their rate.

Q. When was the last time you had personal dealings with them?

A. I have not had any dealings with them in years.

Q. The last percentage you knew they charged?

A. I can only answer about. I don't remember the rate. That was years ago.

Q. You know it was more than one-thirtieth of one per cent?

A. Not much more.

342 Q. You seem to know and don't seem to know?

A. If you ask me something and I don't know exactly I am not going to answer in exact figures.

Q. What was it, about?

A. About 1¼ per cent per month.

Q. You know that is fifteen per cent per annum?

A. My figures don't so show. Every man has their way of figuring. If I pay eight per cent and I am forced to carry a twenty per cent balance, that figures ten per cent. So if a man pays twelve per cent he can figure he is paying really more than that. I don't think the fact that any man does business with the Commercial Credit Company means that he is not a sound business man, otherwise they would not do the volume of business they do.

Q. When you found he had traded your account to them why did you go to Chicago?

A. I wanted to inquire into it.

Q. What did you find out? What did you want to know from him?

A. I wanted to know because we had paid him for this invoice.

Q. What invoice?

A. This particular invoice of $9,225.00.

Q. And you wanted to find out when and why he had sold it to the Commercial Credit Company?
A. Yes, sir.
Q. You paid it by note?
A. That was paid as far as we were concerned.
Q. Why did it make any difference?
A. When I got a letter from the Commercial Credit Com-
343 pany that they had purchased the account for value received.
Q. When was that?
A. Considerably after the notes were given.
Q. Where is that notice?
A. It's at my office, I suppose, among my papers.
Q. Were you not notified to produce the notice from the Commercial Credit Company?
A. We were not notified to produce it, no sir, I don't think so.
Q. Where is that?
A. It is in our papers. You can have it.
Q. When did you get it?
A. The date will show, it's an original. It's in my papers. I guess I can find it.
Q. Then when you found out that he had sold that account to them after you had given him your notes to cover it you wanted to know the situation and went to Chicago for facts. Is that right?
A. Yes, sir.
Q. When was that?
A. I think I left here on September 27th. I don't recall just exactly, but I think that it was September 27th. But it is a matter of record when I left here.
Q. Record where?
A. I can easily establish that it was about September 27th.
Q. Where is it recorded, the date you left here?
A. I wired Hartenfeld Bag Company, I think, that I would be there a certain day.
Q. You went there?
A. Yes, sir.
Q. Did you find out about it?
—. Yes, sir.
Q. What did you find out?
A. I saw Mr. Hartenfeld and asked him about this particu-
344 lar transaction, and he said it was a mistake of his bookkeeper and he said everything was all right. I particularly asked him about his standing and he gave me his financial statement and he enjoyed a wonderful reputation all over. He told me it was a mistake. He did not know how it occurred, but it was a mistake of his bookkeeper, Mr. Simon.
Q. If you knew he had such a wonderful standing, and if you knew he had such a financial statement, and if you knew it was a harmless mistake, using your notes and account too, why did you take a trip to Chicago?
A. I don't know what you call a prudent business man, but the burlap situation was very acute and I wanted to find out the situ-

ation. He satisfied me, and when talking to him about it he said, "I have not the money to pay you, but I have got the merchandise and I can give you all the merchandise you want, but if you have any doubt as to whether I can deliver I will satisfy you about it."

Q. What merchandise did he have?

A. He enumerated the various classes of bags he had.

Q. What was that?

A. Sewed Burlap, inside Coffee Bags and other classes of bags.

Q. What was that?

A. Sewed Burlap, inside Coffee Bags and numerous grades of other bags he had, but these bags were not in condition but would be put in condition and he would ship the goods out.

345 Q. Is that the goods they were to deliver under those notes of $9,225.00?

A. Those notes were for a car of goods he had shipped to Atlanta.

Q. I want to know why you said he had plenty of goods on hand?

A. That's what he said.

Q. Were they goods to be supplied under the $9,225.00 you had furnished him?

A. The $9,225.00 was for goods he had furnished us already, shipped August 29th if I am not mistaken.

Q. They had already been shipped to Atlanta, and you gave him two notes aggregating $9,225.00?

A. Yes, sir.

Q. What other goods were you talking about he had in stock there?

A. He said he had other merchandise and he could let me have it.

Q. For what?

A. He said: "If you have any doubt about my responsibility I have got the goods,—I have not any cash, but in sixty days I will be overflowing with money."

Q. What did he owe you for?

A. He owed me for balance of these notes.

Q. What balance?

A. The first three notes had not been paid in full.

Q. Those the last one maturing on August 22nd?

A. They had not.

Q. You took up the notes?

A. We paid the notes.

Q. And you charged him up with what he had not in the meantime paid you by shipments?

A. We credited him with the amount he had shipped,

346 and whatever was not shipped charged to the balance due us on those notes.

Q. How much did he owe you when you went there on September 27th, for all purposes and for all sources, shortages in shipments, deductions on account of inferior goods, notes that you have given him that he had shipped goods for, and from all sources, what was the total amount of his indebtedness to you when you left here on September 27th to go to Chicago?

A. Including the Commercial Credit Company charge which we

had not disposed he owed us—here are some items he did not allow. He did not allow $350.00 for traveling expenses to Chicago.

Q. When?

A. When I made the trip and Mr. Strauss made the trip.

Q. Mr. Strauss made the trip to get settlement, and you made trip on the 27th to get a settlement?

A. I do not know you would call it indefinitum. The way I looked at it was only we had advanced. Anyway it amounted to round figures when I settled with to him, to $25,000.00.

Q. He owed you when you went up there?

A. I settled at $27,000.00. He owed more than that.

Q. Can you give us the sources of the indebtedness, items that he owed you?

A. When I made this trip he paid me back notes in payment of invoice of August 29th, $9,225.00.

Q. Is that the Commercial Credit Company invoice you are talking about? How much was paid on that $9,225.00?

A. $9,000.00—notes of Hartenfeld Rag Company.

Q. Before you knew that, what do you mean by "notes of Hartenfeld Rag Company" that they had given you?

A. When Mr. Strauss and Mr. Lovitt were in Chicago, Hartenfeld gave them two notes for $9,000.00.

Q. Why did he give them those notes?

A. I think that was the balance due on those old mutton.

Q. By "old mutton" what do you mean, shortages in shipments and inferior goods?

A. Charges, inferior shipments and deductions.

Q. That's about what he was indebted to you when Mr. Strauss went up there and he gave his notes for it, and you did not know he had used your account with the Commercial Credit?

A. No, sir.

Q. So that he owed you not only the $9,000.00, but he owed you the $9,225.00 on the other transaction which you did not know about at that time?

A. He owed us the $9,225.00, provided we made a settlement.

Q. You mean provided you took care of the Commercial Credit Company?

A. We did not have to take care of the Commercial Credit Company. We did not have anything to do with them. Hartenfeld shipped us $9,225.00 of merchandise.

Q. And had your note?

A. Yes, sir, and when I got to Chicago Mr. Hartenfeld explained to me that it was purely a mistake.

Q. If you assumed the liability with the Commercial Credit Company of Baltimore, then he would owe you $9,225.00, because you had given him credit for $9,225.00 worth of goods he had shipped, and he had really duplicated that indebtedness, is that not the fact?

A. Yes, sir.

Q. And had used your note and account?

A. You do not think that if I thought he was not good I would have accepted that liability, do you?

Q. I am not answering questions, I am asking them. Now when Mr. Strauss and Mr. Lovett went up there they gave him $9,225.00 worth of notes, did they?

A. Yes, sir.

Q. Why did he turn around and give them $9,035.00 of notes?

A. Because we thought Hartenfeld was good.

Q. Were you swapping paper?

A. He was supposed to pay his paper, and we paid ours.

Q. Why did you give him notes of $9,225.00 and he turned around and gave you $9,035.00 of his notes?

A. We gave him $9,225.00 in notes to pay our invoice of August 29th, and he gave us his note for the amount mentioned to take care of $9,035.00 he owed us.

Q. You did not strike any balance. He owed you $9,035.00 and gave you notes, and you owed him $9,225.00 and you gave him notes?

A. That's correct.

Q. You did not know anything about that $9,225.00 Commercial Credit Company transaction when Strauss and Lovitt made this settlement?

A. No, sir.

349 Q. How did this $9,035.00 indebtedness to you arise?

A. On three shipments of Guano bags of 3,000 each to replace shortage on original order of 20,000, of which 833 bags were short, making $265.95. There were rejected bags at Savannah Guano Company 12,580, the difference in value of 14c per bag, these bags being No. 2 instead of No. 1, amounted to $1,721.64. Shipment to Savannah Guano Company one lot 5,000 bags not Coffee bags, but what was known as Meal bags, difference 16 cents, making $800.00. We have another item here of $560.00 which Hartenfeld would not allow.

Q. What was that?

A. Eight cents apiece on 7,000 bags, which he would not allow.

Q. All them shipped where?

A. Shipped to Atlanta.

Q. You remember the date they were made?

A. Prior to that time, I do not know exact date. Total $21,087.20.

Q. Was that what he owed you when you went to Chicago?

A. That was what he owed us when I got to Chicago.

Q. When did you get there?

A. I got there October 3rd.

Q. I am talking about the first time.

A. We did not make any settlement the first trip I made.

Q. What did you do there on first trip?

A. I wanted to find out what explanation he made. He satisfied me. Mr. Hartenfeld is a large operator. He told me he made $85,000 in 1917, and he also was interested in a mine that was

350 going to make him a millionaire, he had the reputation of being a millionaire, but when he spoke about this transaction Mr. Hartenfeld said "If you do not believe that I will ship the bags you want to buy I will give you security or surety bond."

Q. The bags you were going to buy? You went up there to make a settlement of what he owed you?

A. We went up there and we were to take bags for this account, and——

Q. He was to ship you bags in payment and he wanted to satisfy you that he would ship them. He wanted to guarantee you that he would ship them. He said he would guarantee that he could do it, that he would do it?

A. Yes, sir, and if I had the least doubt about his capacity of getting bags that he would give me security.

Q. You did not arrive at the amount which he owed you, and that he was to pay by shipment of bags. When you were first up there finding out what was what, between September 27th and October first, you did not find out exactly the amount of the indebtedness that he owed you, and that he was to pay by the shipment of bags to you, and which he was to guarantee as to shipment of bags in payment, a contract for surety bond?

A. When we made this deal together we did not know the exact amount.

Q. But you knew it was around $20,000?

A. He said, "I have got so many bags which I can sell you"——

351 Q. In payment of this indebtedness, and you knew it was around $20,000.00?

A. I think it was about $20,000.00.

Q. How long was this after you got up there?

A. The first day he said, "I can give you this surety bond," and the next day he gave me the surety bond and I came home to arrange the details.

Q. The bond he gave you was to guarantee he was going to ship you enough bags to pay what he owed you?

A. I bought a specific number of bags and quality of bags and when I asked him if he could do this he said, "I can do it this time," and he said, "I have given you a surety bond that I will."

Q. They were to ship the goods?

A. Ship the goods anywhere we wanted.

Q. He owed you around $20,000.00 and was to pay this by shipping bags to you?

A. The first time he did not owe $20,000.00. This first transaction in August of $9,225.00 we had given him notes for that, so that would have made his indebtedness about $12,000.00.

Q. But when you put the account Commercial Credit Company of Baltimore had in with what he owed you it would amount to around $21,000.00 and that he was to pay you by shipping you bags?

A. That's correct.

Q. How long were you there the first time?

A. Two days.

Q. You came back to Atlanta?

A. Yes, sir.

Q. You went by yourself the first time?

A. Yes, sir.

352 Q. But when you got up there the state of accounts between the American Mills Company and the Hartenfeld Bag Company was in substance that the Hartenfeld Bag Company owed the American Mills Company, if you put the Commercial Credit Company of Baltimore transaction in, approximately $21,000.00 net, and the American Mills Company was not indebted to the Hartenfeld Bag Company at all?

A. No, that could not have been.

Q. Why did you want to take the debt out in bags?

A. Bags at that time were just as good as gold. I would just as soon had bags as gold.

Q. Had you rather have had bags than gold?

A. At that time I had rather have bags than gold.

Q. Did you refuse to take the money?

A. He told me he did not have it.

Q. He told you he did not have it?

A. But I do not think he discussed it.

Q. But you went up for the purpose of effecting settlement?

A. I never asked him for a cent.

Q. You went up there for settlement, and you had rather have had bags than actual gold money in payment of it?

A. If he had said to me you can have the money or nothing I would have taken the money than nothing.

Q. You had just as soon have the bags as money?

A. Yes, sir. He had contracted to put it in bags. He assured me that he could get somebody to go on his bond; that he was successful in doing.

353 Q. You said you came back to Atlanta and stayed around here one day?

A. I went up there September 27th and stayed two days and got back here on the 30th, I think.

Q. And you left the same day you got here?

A. I think I left the next day.

Q. You had a settlement with him?

A. We did not arrange the details of the settlement.

Q. What do you mean by "details"?

A. I had not paid the money over on the contract, the $22,100.00.

Q. You were to pay $22,100.00?

A. Yes, for bags.

Q. He was to pay you but $21,000.00 in bags?

A. We were to pay him $22,100.00 for bags to be delivered in seventy-five days.

Q. He did not owe you that much, but he was to pay you that and about $1,000.00 more in bags?

A. Yes, sir.

Q. You fixed all that up when you were up there?

A. No, sir.

Q. Did you not see him and get the contract of surety that he was going to do it?

A. The surety bond was dated September 27th, the contract was dated the 27th, but we did not get the surety bond until the 28th. When I got the contract and bond I came home.

Q. Which guaranteed that he would pay that money to you by delivering bags. When you got that you came home?

A. Yes, sir.

Q. Then you came back to arrange the details?

A. I did not have the money. I don't carry $22,000.00 in my pocket.

354 Q. When he had arranged to pay you the contract?

A. So I paid him $22,100.00 in cash, which I did as soon as I could. I came back home and got the money and paid him $22,100.00 and he paid me $21,087.20. I paid him in advance for the bags I was to get.

Q. What bags did you pay him for?

A. I bought $22,100.00 worth of bags.

Q. When did you buy them?

A. I bought them on September 27th, and the bond was issued on September 28th.

Q. You mean you paid him for a debt you had against him?

A. I did not so consider it.

Q. He agreed to settle with you by delivering bags?

—. ——.

Q. You left there on the 28th with that contract in hand?

A. Yes, sir.

Q. And that contract guaranteed that he would pay your debt by delivering to you bags?

A. I never had any dealings with the surety bond. When a man says I can give you a surety bond to perform if you think I am not going to do what I agreed, I want to be sure. $22,000.00 is a good bit of money.

Q. He owed you about that amount?

A. But when he gave me the surety which I asked——

Q. The debt which he owed you amounted to $21,000.00, and you wrote a telegram while you were putting those negotiations through with Hartenfeld, you wrote a telegram and sent it to your people down here in Atlanta to hold your reply to the Commercial Credit Company until you could finish your negotiations

355 with Hartenfeld. And if he had not guaranteed the payment of your debt, as he did guarantee it with the bond, you would not have assumed the debt to the Commercial Credit Company?

A. Certainly, because we did not owe it.

Q. And you would not have added that to the $12,000.00 he already owed you?

A. Except by giving the bond. By giving me the bond it showed me he was all right.

Q. What did you ever do about the Commercial Credit Company account of $9,225.00?

A. When the bags were received we went through them and found that they were not exactly as invoiced and notified the Commercial Credit Company that part of the goods were correct and we paid them for that, and they sent a man down here and took charge of the balance of the bags, 50,000. The invoice was $9,225.00, and

50,000 bags returned, which were invoiced at $6,875.00. Those bags were returned to them. We charged freight $353.48, labor $90.00, unloading $12.00, and we sent them a check for balance due of $1,894.25 November 29th, and we paid it.

Q. What you paid them was $1,825.00?

A. We paid them $9,225.00. We gave them back their goods. When we made the settlement it was their goods.

Q. You bought those bags from the Hartenfeld Bag Company at an agreed price of $9,225.00?

A. For a certain grade of bags.

Q. At an agreed price of $9,225.00 Hartenfeld Bag Company shipped you the bags?

A. Yes, sir.

356 Q. You owed them on the face of the invoice for those bags $9,225.00?

A. Correct.

Q. And they transferred that account of $9,225.00 to Commercial Credit Company of Baltimore?

A. That's correct.

Q. When that invoice fell due November 29th you sent them a check, the Commercial Credit Company in payment of that account for $1,894.50, did you not?

A. I would not put it that way. We paid them $1,894.50 and merchandise $6,875.00 and expenses and freight $455.48.

Q. Whose merchandise was it?

A. Commercial Credit Company's. I explained to you that when I came back we assumed that transaction for Hartenfeld, therefore it was due the Commercial Credit Company, and I turned them back the goods not accepted. I did not pay in deductions. I settled them on amount agreed on.

Q. What did you do with Hartenfeld's bags?

A. They belonged to Commercial Credit Company after he had transferred the account to them. We paid the account so far as Hartenfeld was concerned when we agreed to assume the account with the Commercial Credit Company. The dollars or the bags belonged to the Commercial Credit Company.

Q. You rejected the bags, did you not?

A. We turned them back to Commercial Credit Company.

Q. What I want to know. Mr. May, is, you paid money
357 to the Commercial Credit Company of $1,894.50, and you did not pay any more money than that?

A. Yes, sir.

Q. When did you ship those bags to the Commonwealth Credit Company?

A. I cannot give you the date. That was handled by Mr. Lovitt, I believe. Their man was down here and he took the bags over.

Q. About when?

A. It was about this time.

Q. Was it a little after that?

A. I can find out for you, I don't know exactly.

Q. Does this not show October 5th?

A. We did not assume that invoice until October 5th when I came back.

Q. You settled up on November 29th?

A. Yes, sir.

Q. How did the price of bags on November 29th compare with the price of the same bags when that invoice was shipped?

A. I do not know.

Q. As near as you can?

A. I should say on December first there must have been a drop of possibly thirty per cent from August 29th.

Q. No more than thirty per cent from 22nd of August to December first?

—. ——.

Q. Mr. May, have you told us everything you did in the two days you were in Chicago the first time when you got there on September 27th?

A. All I did was when I got in communication with Hartenfeld, who is quite a busy man, and he spoke to me and told me how this error occurred; that there was no excuse for it; that it was a bonehead error of his bookkeeper and everything was all right; that he was in business; he had bags on hand and could sell them
358 to me, and told me at the time, "I can give you a surety bond. I am doing it for others, and if you have got any doubt" that he would give me surety bond. We wrote up contract and he submitted the contract to the surety company and the surety company accepted the contract next day.

Q. Before you did that you assumed that liability to the Commercial Credit Company of Baltimore?

A. No, sir, I had not closed until I got back. The contract will speak for itself.

Q. I am asking you what you did with Hartenfeld?

A. If we had not paid the money to the bonding company?

Q. To the bonding company.

A. If we had not paid the money to Hartenfeld Company we would not have gone into the arrangement of buying these bags.

Q. Hartenfeld bought these bags?

—. ——.

Q. What details did you go back there to finish?

A. I went back to finish the details, to consummate the deal.

Q. What do you mean by "finish the details" "to consummate the deal"?

A. I had to pay $22,100.00 under my agreement with Hartenfeld Bag Company. I went back with my counsel.

Q. Why did you go back with him?

A. I had never had any experience with a surety bond, and when I read the surety bond I was afraid I could not——

Q. When did you first read it?

A. I took the surety bond with me. I thought all that was
359 necessary to do was put up the money and that would finish my part, but I found that if you did not take receipt and pay the money—I thought it better to be safe than sorry, and for that reason I took my counsel along.

Q. You brought the surety bond back with you to Atlanta from Chicago?

A. I think I did.

Q. When Mr. Hass went back there to Chicago you took a certified check for $22,100.00 from the Third National Bank of Atlanta?

A. That's right.

Q. Who was it payable to?

A. Payable to Hartenfeld Bag Company, I think.

Q. It was signed by American Mills Company and payable to Hartenfeld Bag Company.

A. Yes, sir.

Q. You turned it over to Hartenfeld.

A. Yes, sir.

Q. What did you do then?

A. He said he would pay me and we went to Foreman Bros. Banking Company and he introduced us to the Vice President who said Mr. Hartenfeld was a nice young man and highly regarded. Hartenfeld then gave us back a certified check for the amount he owed us.

Q. You took him a certified check for $22,100.00 and went with him to the bank? He deposited your check?

A. I presume he did.

Q. You saw him do it?

A. No, I was talking to this man.

Q. You got his certified check for $21,087.20 and you gave him your check?

A. No, sir. I gave him my check at his office.

360 Q. And that money was paid to you at the same time you paid Hartenfeld Bag Company $22,100.00?

A. Not at the same time but same day.

Q. Did you go from Hartenfeld's office down to the bank?

A. Yes.

Q. All of you go?

A. Mr. Haas, Mr. Hartenfeld were with me. We went at Hartenfeld's solicitation. I was not worried about him.

Q. You sent your Mr. Strauss and your manager up there on September 14th to make a settlement with him, did you not?

A. He was to come to Atlanta and he wired us he would pay their expense to come up there.

Q. He did not allow it?

A. No, sir.

Q. Had you not been wiring him that he must come down and make settlement?

A. I don't think we wired him to come down and make settlement, but to see that he filled those orders. We were thinking about getting our goods, we owed the shipments and we wanted them shipped.

Q. Did you not send this wire on 12th of September, just before you sent your Treasurer and Foreman to get settlement? (Hands witness telegram.)

A. I think that telegram was sent by Mr. Lovitt, I have seen a copy.

Q. You knew about it at the time?
A. No, sir, I did not.
Q. You mean Lovitt sent that without consulting you?
A. He was interested in the delivery of bags more than I was. Everytime he sends a telegram he does not come to me.
361 Q. You mean that Lovitt sent this telegram:
"Have tried to get you on phone, but seems you do not want to talk. Wire use when you are willing to talk.
AMERICAN MILLS COMPANY."

You mean to say that your superintendent sent that telegram to Hartenfeld in Chicago without your consent or direction?
A. I would not say that. I may have been out of town.
Q. Why did you send Strauss and Lovitt up there two days later?
A. I think Hartenfeld wired them to come.
Q. Is not just the opposite the fact?
A. No.
Q. At any rate you sent your Superintendent and Treasurer up there to make a settlement on the 14th, and you went again yourself a little before the 27th, and still you were not worried at all about this debt that he owed you?
A. When I got this notice from Commercial Credit Company I wanted to know what was the matter. It seemed strange. I did not know what he had done. But he satisfied me. If you would just meet that man he would satisfy you. He was a remarkable man. I see it now.
Q. Mr. May, you had not got the notice from the Commercial Credit Company when you sent your Superintendent and Treasurer up there?
A. No.
Q. You sent them up there to get a settlement?
A. We wanted deliveries.
Q. Did you not get settlement, did you not accept $9,225.00 for $9,035.00—swap notes? *accept $9,225.00 for $9,035.00—swap notes?*
362 A. Do you call that getting money?
Q. You sent them up there to get settlement?
A. To get deliveries.
Q. To swap notes?
A. I did not know anything about that.
Q. They represented your Mills in that transaction?
A. We did not go back of what they did.
Q. They made it?
A. They did not make a settlement, they went up to see about getting deliveries.
Q. Why did you pay $22,100.00 to Hartenfeld? Why did he pay you on the same day check for $21,087.20?
A. I paid the $22,100.00 because the contract I had made specified we must pay it.
Q. What contract are you talking about?

A. I am talking about the contract with the surety bond attached.

Q. Where is that contract?

A. I guess we have got it in the safe.

Q. Bring that here, will you?

A. Yes.

Q. Whom was that check signed by?

A. Signed by me as President, and countersigned by Mr. Strauss as Secretary and Treasurer.

Q. When it was paid to whom did it go back?

A. To the Third National Bank of Atlanta, I suppose. You cannot get them back from the bank.

Q. It was issued for you?

A. Yes, sir.

Q. You have got no objection to the bank furnishing it?

A. Not at all.

363 Cross-examination.

By Mr. Phillips:

Q. On 27th of September or thereabouts Hartenfeld had money that you had advanced him in one way or another amounting to approximately $21,000.00?

A. About $21,000.00, yes, sir.

Q. Three days after that, or four days after that, he had $22,100.00 of your money additional?

A. Yes, sir, $22,100.00.

Q. In other words, the situation was no different on October 5th than September 27th, except he owed you more money than he had before?

A. That's right, yes, sir.

Q. And you had an agreement from him to give you bags for it and that agreement was guaranteed by the surety company, is there any difference other than that?

A. The only difference was, Hartenfeld owed us for latent defects we had not discovered at that time.

Q. In other words to date he has more money of yours than he had on September 27th, is that not true?

A. Yes, sir.

Redirect examination.

By Mr. Conyers:

Q. Is it true that you gave them the $22,100.00 check to furnish them the money to pay you the $21,087.20 which they owed you? Did you give them that $22,100.00 check to furnish the money to pay you the debt of $21,087.20?

A. I will answer you that question when I get the contract. I bought the bags and agreed under the contract to pay him
364 $22,100.00, which he was to deliver, and then he paid me the $21,087.20.

Q. Then he paid you $21,087.20 past due debt?

A. He owed it to us.

Q. On the first day of October he owed you $21,087.20, he did not owe you $21,087.20, less $9,225.00. When he gave you that check how much did he owe you when he gave you that check?

A. That was on October 3rd that he owed us $21,087.20 and the amount of our check $22,100.00 because we had agreed to take up the Commercial Credit Company account.

Q. Without taking up the account how much did he owe you?

A. $9,225.00 less.

Q. Did he not have at least $12,000.00 in money that he owed you in October?

A. He owed us $21,087.20 and he owed it and paid it to us on or about October 3rd.

Q. Mr. May, I hand you herewith this copy contract now produced by your counsel. I wish you to look at it. Now is that the contract that you made with Hartenfeld on September 27th last?

A. Yes, sir, this is correct.

Q. That $22,100.00 mentioned in there was to be paid for goods to be delivered to you, was it?

A. $22,100.00 was for goods which he said he had on hand, or was going to get in shortly when he would deliver them to us.

Q. Where were the bags to come from in payment of the debt he owed you, as you testified about a while ago?

A. State that again, please.

Q. Where were the bags that you testified about a while
365 ago to come from that he was to deliver in payment of the debt that he owed you?

A. This is a new contract.

Q. I am not asking about that. He had agreed to pay in bags. Where were those bags? He agreed on September 27th which you were talking about?

A. Yes, sir.

Q. Those are the bags he is to deliver in payment of the debt?

A. I don't understand the question.

Q. That was the bags he was to deliver under this contract in payment for this debt to you?

A. This contract speaks for itself. The total amount of the contract was $22,100.00 to be *be* paid Hartenfeld Bag Company for exetion of this contract, receipt of which is hereby acknowledged. This contract was secured by the bond we got on the 28th.

Q. The contract specified he was to get the bond?

A. Yes, sir.

Q. You paid the money on October 3rd?

A. Just as soon as I came down here and got it.

Q. And he paid you $21,087.20 that he owed you.

A. Yes, sir, settlement we made. He owed it to us.

Q. Mr. May, I want, if His Honor permits, to ask you one question and that is this: If Hartenfeld Company owed you on your settlement $21,087.20, you understand, why did you pay them $22,100.00 in money on a contract to deliver bags?

A. The contract speaks for itself, the contract provides for it.

366 Q. He owed you the $21,087.20 for transactions that had already taken place, did he not, is not that true?

A. We had not made a settlement because that $9,225.00 was not disposed of.

Q. That was a contract had beside?

A. That did not make any difference.

Q. Did you not cover the invoices that had been shipped to you?

A. That had been disposed of.

Q. It entered into the $21,087.20, and the balance over the $21,-087.20, over and above the $9,225.00, was money that he owed you on past transactions?

A. Yes, sir.

Q. If he owed you $21,087.20 on transactions that were already over with, you made, you say, a new contract with him to deliver you $22,100.00 of bags in the future?

A. The contract says——

Q. Did you not do that?

A. Yes, sir.

Q. The new contract of $22,100.00 for future delivery of bags was separate and distinct from the $21,087.20 he already owed you?

A. I did not think it was separate and distinct. If he did not produce the bond——

Q. Were you contracting for $22,100.00 of bags in addition to the amount he owed you?

A. The contract speaks for itself.

Q. Were you asking for the delivery of—asking for the delivery of $22,100.00 of bags besides what he already owed you?

A. That cancelled the other debt.

Plaintiff's prima facie case closed.

DEFENDANT'S PROOFS.

367 *Testimony of Armand May on the Trial of the Case in New York.*

ARMAND MAY, a witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Moses:

Q. 1. Mr. May, are you the same person who testified by deposition in Atlanta, in this case?

A. Yes.

Q. 2. Was there any correspondence passing between the Hartenfeld Bag Company and the American Mills Company after that date?

A. Yes.

Q. 3. After September 27, 1918?
A. Yes.
Q. 4. State what correspondence passed after September 27, 1918, between the American Mills Company and the Hartenfeld Bag Company.

The Court: I have read some of it.

Q. 5. Other than that which has been offered in evidence?
A. We have a telegram here dated October 22, 1918, from Chicago, which reads as follows:

"American Mills,
Atlanta, Ga.:

What will you offer car load twenty and twenty-one by forty bags twenty thousand heavy sugar centals twenty-two by thirty-six twenty thousand rice pockets all immediate delivery help us out on
368 whatever merchandise you can use and this will aid us materially in filling your contract answer.
HARTENFELD BAG CO."

There is another letter here dated October 22, 1918, written by the Hartenfeld Bag Company to the American Mills Company, Atlanta, Georgia, as follows:

"GENTLEMEN:

Your favor of the 16th and will execute your contract, in the meanwhile we wire you today as per confirmation attached.
Very truly yours,
HARTENFELD BAG CO."

Q. 6. What contract does that letter refer to, if you know?
A. This contract refers to the contract with the surety bond attached.

Mr. Rowe: May I say the contract of September 27, 1918?
The Court: Yes.
The Witness: We have here a day letter from Chicago, Illinois, November 4, 1918, reading as follows:

369 "American Mills Co.,
Atlanta, Ga.:

Send shipping instructions on everything purchased that is covered by American Surety Bond, as we have these goods ready offer twenty thousand heavy sugar centals twenty thousand rice pockets one hundred thirty dollars Chicago our confirmation tens rival draft wire.
HARTENFELD BAG CO."

I presume what he means by "Tens rival draft," is ten days sight draft.

Now the American Mills Company, Atlanta, Georgia, sent a telegram dated November 5, 1918, to the Hartenfeld Bag Company, 312 North Carpenter Street, Chicago, Illinois, reading as follows:

"Telegram received ship the order in carload lots to us here for final inspection and acceptance. We hope the goods are strictly up to grade in every respect regarding other bags will advise later.

AMERICAN MILLS COMPANY."

Here is a letter that I wrote under date of November 6, 1918, to the Hartenfeld Bag Company—I should say I dictated it—reading as follows:

370 "GENTLEMEN:

We received your telegram of November 4th, which reads as follows:

'Send shipping instructions on everything purchased that is covered by American Surety Bond as we have these goods ready offer twenty thousand heavy Sugar Centals twenty thousand rice pockets one hundred thirty dollars Chicago our confirmation tens rival draft wire.'

And we promptly wired you the following:

'Telegram received ship the order in carload lots to us here for final inspection and acceptance we hope the goods are strictly up to grade in every respect regarding other bags will advise later.'

Again let us emphasize to you that by all means see to it these goods are strictly one hundred percent as per purchase so that there can be no possibility of a complaint.

We can tell you frankly that when these goods come in we are going to go over all of them carefully as it is a very large purchase and under the Bond with the American Surety Company then as far as the Bonding Company is concerned we have no further claim, and we want to avoid this.

371 "We want to congratulate you on getting these goods up at this time and having them all ready for shipment. This is doing fine.

With best wishes, we are,

Yours very truly,

AMERICAN MILLS COMPANY."

On November 13, 1918, there is a letter from Hartenfeld Bag Company, Chicago, to us in Atlanta, Georgia, reading as follows:

"We beg to acknowledge receipt of your letter of the 6th, and thank you for your prompt action in this matter. This will be given our best consideration.

Very truly yours,

HARTENFELD BAG CO.
J. SIMON."

Under date of November 22, 1918, I dictated a letter to the Hartenfeld Bag Company, Chicago, as follows:

"You understand with reference to the Inside Cof-ees that we do want to ship any further bags to Philadelphia.

We received your invoice covering the 1,500 Insides and up
372 to this writing we have not received the invoices covering the lot of goods which you advised us by wire were ready for shipment, and we sincerely hope that this will move shortly.

We think that between the time we received the wire and today that you have had ample opportunity to ship, and we await with considerable interest your reply.

You understand that we want these goods in Atlanta so we can inspect them before final acceptance.

We await with interest your reply.

Yours very truly,

AMERICAN MILLS COMPANY."

We received a telegram from Hartenfeld Bag Company, dated December 11; 1918, as follows:

"Fire our plant last Sunday and yesterday making shipments on contracts rushing same to Atlanta.

HARTENFELD BAG CO."

We wired them on the same day, December 11, 1918, as follows:

373 "Hartenfeld Bag Co.,
312 North Carpenter St.,
Chicago, Ill.:

Must insist on strict compliance with contract which has expired.

AMERICAN MILLS CO."

Q. 7. Did the American Mills Company receive all the merchandise covered by the contract of September 27, 1918?

A. No.

The Court: I think he testified to that; he received $1,050 worth of that.

The Witness: With a lot of merchandise that was shipped en route to us on December 12th, that we never got.

Q. 8. What became of that?

A. Evidently it was attached by somebody when it was invoiced to us; it was already shipped to us; there were 50,000 bags.

Q. 9. Will you read the correspondence which passed between the American Mills Company and the American Surety Company after September 27, 1918; all of it. Tell first whose letter it is that you are reading.

A. November 6, 1918, is a letter which I dictated personally to the American Surety Company, Chicago, Illinois, reading as follows:

"We received a telegram yesterday from the Hartenfeld Bag Company, Chicago, reading as follows:

374 'Send shipping instructions on everything purchased that is covered by American Surety Bond as we have these goods ready offer twenty thousand heavy Sugar Centals twenty thousand rice pockets one hundred thirty dollars Chicago our confirmation tens rival draft wire.'

And we wired them the following:

'Telegram received ship the order in carload lots to us here for final inspection and acceptance we hope the goods are strictly up to grade in every respect regarding other bags will advise later.'

We thought it best to give you this information inasmuch as this purchase is covered by your Surety Bond and we sincerely hope that the goods upon arrival will be as represented.

Yours very truly,

AMERICAN MILLS COMPANY."

Here is another letter written by Mr. Strauss under date of November 20, 1918, to the American Surety Company of Chicago which reads as follows:

"GENTLEMEN:

Through error on our part a communication of Nov. 16th intended for you was addressed to the National Surety Company and
375 as we do not know whether or not this letter will reach you, we desire to quote you from our letter as below:

"We wrote you several days ago with reference to a telegram which we received from the Hartenfeld Bag Company but as yet we have not received an acknowledgment of this letter.

We might also state that up to this writing we have not received invoice from Hartenfeld covering this shipment, but we have received an invoice for $1,500 to apply on this to come to our account."

"Asking your pardon for our error and awaiting your reply, we remain,

Yours very truly,

AMERICAN MILLS COMPANY."

We addressed another letter which I dictated under date of November 22, 1918, to the American Surety Company, of Chicago, reading as follows:

"GENTLEMEN:

We wrote you under date of November 6th as follows:

'We received a telegram yesterday from the Hartenfeld Bag Co., Chicago, reading as follows:

376 'Send shipping instructions on everything purchased that is covered by American Surety Bond as we have these goods

ready offer twenty thousand heavy Sugar Centals twenty thousand rice pockets one thousand thirty dollars Chicago our confirmation tens rival draft wire.'

And we wired them the following:

'Telegram received ship the order in carload lots to us here to final inspection and acceptance we hope the goods are strictly up to grade in every respect regarding other bags will advise later.'

We thought it best to give you this information inasmuch as this purchase is covered by your surety bond and we sincerely hope that the goods upon arrival will be as represented.'

Up to this writing we have not had an acknowledgment of this, and we will thank you to please acknowledge receipt.

In this connection we desire to state that up to this writing we have not received the invoice from the Hartenfeld Bag Company covering the shipment, although we did receive invoice for $1,500 to apply.

We would thank you to please acknowledge receipt of this letter, and oblige.

Very truly yours,

AMERICAN MILLS COMPANY."

377 Here is a letter from the Legal Department, Home Office, of the American Surety Company of New York, at Chicago, addressed to the American Mills Company, reading as follows:

"Chicago, Nov. 25, 1918.

American Mills Co.,
Atlanta, Ga.

GENTLEMEN:

Re #1,185,351—Hartenfeld Bag Co. to American Mills Co.

Kindly permit us to acknowledge receipt of yours of the 22nd; also to apologize for not having replied to your favor of the 6th inst., re the above. Since receipt of your letters, I have communicated with the Hartenfeld Bag Co., and I am told that as soon as shipment is made to you we will be advised of it. Needless to say, as soon as I get word that a carload of bags has been sent to you, I will write you immediately.

As a matter of information may I ask whether or not the 1,500 insides is in part completion of this contract, and if so, what is the value of same?

Yours very truly,

J. L. MOEHLE,
Assistant Manager."

378 Here is a letter we wrote under date of November 28, 1918, reading as follows:

"American Surety Company of New York,
Attention of Mr. J. L. Moehle, Asst. Mgr.,
Continental & Commercial Bank Bldg.,
Chicago, Ill.

GENTLEMEN:

Re #1,185,351—Hartenfeld Bag Co. to American Mills Company.

We have for acknowledgment yours of the 25th.

The last day for performance by the Hartenfeld Bag Company under its contract with the American Mills Company will shortly expire, the time for performance being within 75 days from the date of the contract, which was September 27, 1918.

Up to the present time only one shipment which is referred to in your letter, has been made under this contract. The value of this shipment has not yet been determined inasmuch as the goods have not yet reached destination. Inasmuch as all goods under this contract must be examined by us before acceptance, it is important that these shipments be made at once.

379 In our communication of the 6th instant to the Hartenfeld Bag Company, copies of which were sent you, we requested, in response to advices from the Hartenfeld Bag Company, that these goods be shipped in car-load lots to Atlanta. We have received no advice from the Hartenfeld Bag Company that these shipments have been made.

We are writing you this for your information.

Very truly yours,

AMERICAN MILLS COMPANY."

Here is a letter from the American Surety Company of New York, from their Chicago office, reading as follows:

"Chicago, Ill., Dec. 6, 1918.

American Mills Company,
P. O. Box 1125,
Atlanta, Ga.

GENTLEMEN:

1,185,351—Hartenfeld Bag Company to American Mills Company.

We have received your letter of November 28th, 1918, in regard to your contract with the Hartenfeld Bag Company, but have
380 not as yet been able to get any data from them as to the shipments referred to. We will, however, keep after them and if said shipments are not made within a reasonable time request that you promptly advise us.

Trusting that there will be no more delays, we remain,

Yours very truly,

M. L. JENKS,
Manager,
By JAY J. REYNOLDS.

Under date of December 9, 1918, is another letter I wrote personally to the American Surety Company of New York, Continental & Commercial Bank Building, Chicago, Illinois, as follows:

Attention of Mr. Jay J. Reynolds.

"GENTLEMEN:

In re #1,185,351—Hartenfeld Bag Company to American Mills Company.

We have for acknowledgment yours of Dec. 6th in reply to ours of November 28th.

Up to the time of writing this letter, we have received notice of no further shipments by the Hartenfeld Bag Company.

381 The last day delivery may be made on these bags by the Hartenfeld Bag Company is December 10th, 1918, this being 75 days from the date of the contract, which was September 27th. After December 10th, 1918, the contract provides that the Hartenfeld Bag Co. shall repay to the American Mills Co. the difference between $22,100.00 paid under this contract and the value of the bags delivered.

Should there be no further delivery of bags to us by December 10th, we shall insist upon the immediate return of the $22,100.00 paid to the Hartenfeld Bag Co., under this contract, from which sum is to be deducted the value of the one shipment which is approximately $1,067.50. The exact value of this one shipment will be determined as soon as examination of it can be made. Should this one shipment correspond with the contract, its value will be $1,067.50.

Yours very truly,

AMERICAN MILLS CO.,
A. MAY, *Prt.*"

Here is a letter written in Chicago on December 14, 1918, reading as follows:

382 Chicago, Ill., December 14, 1918.

The American Surety Company of New York, Room 1266, Continental and Commercial National Bank Building, 208 So. La Salle Street, Chicago, Ill.

GENTLEMEN:

Notice is hereby given you of the default upon the part of Hartenfeld Bag Company, of Chicago, Illinois, under that certain written contract dated September 27, 1918, between the American Mills Company, of Atlanta, Georgia, party of the first part, and the Harten-eld Bag Company, of Chicago, Illinois, party of the second part, for the sale and delivery by the latter to the former of seventy-five thousand (75,000) bags (Coffee and Gold Medal), and Thirty thousand (30,000) pounds guaranteed sewed burlap (all more fully

described in said contract), and for the return immediately at the expiration of seventy-five (75) days by the Hartenfeld Bag Company to the American Mills Company (in the event of the failure of the Hartenfeld Bag Company to make delivery of said contract)
383 of the difference between the sum of Twenty-two thousand one hundred dollars ($22,100.00) (the total amount of said contract) and the price of the bags delivered under said contract, and also the default under the conditions of that certain bond executed and delivered under date of September 28, 1918, by the said Hartenfeld Bag Company, as principal, and you, the American Surety Company of New York, as surety, to the Undersigned, the American Mills Company.

Said default consists of the failure upon the part of the said Hartenfeld Bag Company at the expiration of the said Seventy-five (75) days immediately to return to the said American Mills Company the difference between the Twenty-two thousand one hundred dollars ($22,100), (being the contract price) and the price of the bags delivered; the said Hartenfeld Bag Company having failed to deliver the merchandise on or before seventy-five (75) days after the date of said contract.

The Hartenfeld Bag Company claims to have delivered f. o. b. Chicago, to the American Mills Company under said contract Thirty-five hundred (3,500) strictly number one inside coffee bags. Those thirty-five hundred (3,500) bags have never been received by the said American Mills Company. In the event that these bags so shipped upon their receipt are found to conform with the
384 bags referred to in said contract, the same will be credited on the contract. In that event the default under the contract and the bond is the failure immediately at the expiration of said Seventy-five (75) days to return to the American Mills Company the sum of Twenty-one thousand and fifty dollars ($21,050), which is the direrence between the amount of the contract price, to wit: Twenty-two thousand one hundred dollars ($22,100.00), and the price of the bags delivered, to wit: Ten Hundred and fifty dollars ($1,050). In the event that the Thirty-five hundred (3,500) bags do not conform with the bags described in the contract, the default under said contract and bond consists of the failure immediately at the expiration of said Seventy-five (75) days to return to the American Mills Company the said purchase price of Twenty-two thousand one hundred dollars ($22,100.00).

This notice is given to you pursuant to the provisions of the bond given by the Hartenfeld Bag Company, as principal, and yourself, as surety, to the American Mills, above referred to.

You will kindly govern yourself accordingly.

Respectfully,

AMERICAN MILLS COMPANY,
By HERBERT. J. HAAS,
Its Duly Authorized Agent and Representative in This Behalf."

(By Registered Mail.)

385 Cross-examination.

By Mr. Rowe:

X Q. 10. I call your attention, Mr. May, to American Surety Company Exhibit 20, of September 27, 1919, which you testified in your deposition was prepared at Mr. Hartenfeld's office, and was then taken by you to your counsel and that your counsel made those pencil notations thereon. Do you remember so testifying?

A. Yes.

X Q. 11. Were those notations made in your presence?

A. Yes.

X Q. 12. By whom?

A. By my attorney.

X Q. 13. What was his name?

A. Mr. Rhodes.

X Q. 14. Of Chicago?

A. Yes.

X Q. 15. Do you know what his address is?

A. No, I do not.

Mr. Moses: I o*d*er in evidence exemplified copy of record of the case in the Fulton Superior Court, in the County of Fulton, State of Georgia, in the matter of American Mills Company, Plaintiff, against Hartenfeld Bag Company, Principal, and American Surety Company of New York, Surety, defendants.

Marked Defendant's Exhibit A.

The Court: When was that suit instituted?

Mr. Haas: About December 21st or December 22nd.

Mr. Moses: I offer in evidence, with the permission of the
386 Court, exemplified copy of a declaration in an action brought in the Circuit Court of Cook County, Illinois, Gen. No. B. 48,488, American Mills Company, a corporation, plaintiff, against Hartenfeld Bag Company, a corporation, and American Surety Company of New York, a corporation, defendants.

Marked Defendant's Exhibit B.

The Court: When was that suit brought?

Mr. Rowe: December 16th, for the first time.

Mr. Moses: It was served on December 24th, the last day provided by the bond.

Mr. Rowe: The declaration was served upon the American Surety Company upon the 17th day of December and upon the Hartenfeld Bag Company upon the 24th day of December, as appears by the record of the Clerk.

Mr. Moses: I offer in evidence the pleas filed in the Circuit Court of Cook County, Gen. No. B. 48,488, by the American Surety Company of New York in the case entitled American Mills Company, a corporation, plaintiff, against Hartenfeld Bag Company, a corpora-

tion, and American Surety Company of New York, defendants. This is also exemplified under the Act of Congress.

Marked Defendant's Exhibit C.

Mr. Moses: I also offer in evidence the replications filed by
387 the plaintiff in the Circuit Court of Cook County, Illinois, in the case Gen. No. B. 48,488, American Mills Company, a corporation, plaintiff, against Hartenfeld Bag Company, a corporation, and American Surety Company of New York, a corporation, defendants, the replications being replication to the pleas filed by the American Surety Company, joining issues thereon. That is exemplified according to the Act of Congress.

Marked Defendant's Exhibit D.

Mr. Moses: As a matter of form, though I do not think it is necessary, I will offer in evidence the particular bond in question, to which is attached the contract entered into between the American Mills Company and the Hartenfeld Bag Company.

The Court: It has been thoroughly proved. Let it be delivered to the Clerk and impounded, if you please.

Mr. Moses: If the Court please, I do not exactly understand what the Court intends.

The Court: When the case is over you will understand. For the present it is an exhibit. All exhibits are in my custody, unless I choose to let them go out. That for the present I shall certainly not let go out.

Marked Defendant's Exhibit E.

(The same is hereby impounded, being endorsed as follows:

388 "Original bond American Surety Company of New York, contract attached thereto being Exhibit E, is hereby ordered to be impounded by the Clerk and the same to be withdrawn only upon entry of an order. Dated November 20, 1919, Rose, D. J.")

Defendant rests.

Both sides rest.

Argument.

The Court: The only question I want to have argument upon is the law. There was a cold blooded fraud perpetrated upon the Surety Company; that is too plain for argument; I have not any doubt whatever about that.

Mr. Moses: Assuming, therefore for the sake of the argument that the Court holds that there has been a fraud committed, I want to address myself merely to the question as to whether or not relief should be granted in this case by the Court.

This is an action to cancel an instrument and to enjoin the prosecution of a suit at law; in fact, two suits at law, which actions are brought merely for the recovery of the money only, and for no other

purpose. The evidence in this case shows that the action is pending, one in Fulton County, Georgia, the other action is pending in
389 the Circuit Court of Cook County. That is, in each of those suits the American Surety Company, has defended upon the very grounds which it is asserting here affirmatively and asking this Court to give affirmative relief upon. In both of these cases issue has been joined on the Common Law side of the Courts submitting theso issues for trial by jury.

I understand the law here, and I think the cases so state, that Courts of Equity will never cancel instruments where when that instrument is the basis of a law suit the Surety Company or the insurance company could defend upon the very grounds that its claim exists, which constitute the fraud.

Now my position is that even if the Court should find that there was fraud in this case, we cannot be deprived of the right of trial by jury on the issue as to whether there is fraud, and that the Supreme Court of the United States and the lower courts hold to the same effect, and that every State court holds that in the United States except the State of Michigan.

Mr. Rowe: In the Griswold case, 141 U. S., 250, the Supreme Court apparently has laid down a different rule from that laid down in these insurance cases in the case of sureties. That was a case where a man was induced by fraud to execute and he had a
390 bond, where the defendant in the law suit was arrested, and he executed the bond as he thought——

The Court: I do not think that case helps you materially.

Mr. Rowe: Then there is one other question I would like to call the Court's attention to, and that is that in the Federal Courts, and it has been so held by the Supreme Court of the United States, that the objection that the plaintiff had an adequate remedy at law, or the person applying in equity has an adequate remedy at law, may be waived by the acts of the parties.

The Court: Yes, but it is only waived when it is not set up in the answer, and I am advised that it is set up in this answer.

Mr. Rowe: But they come in and ask for affirmative relief in the answer and ask for a judgment on the bond in this particular suit.

The Court: Do they?

Mr. Rowe: Yes, sir.

The Court: Then that settles the case.

Mr. Rowe: There is not any question that they ask for it.

The Court: Then that settles it.

Mr. Moses: If your Honor does not want to hear me——

The Court: If you come into a Court of Equity and ask for affirmative relief, you submit yourself to the jurisdiction of the Court.

Mr. Moses: We are not entitled to any equity relief in this
391 Court; it is a purely legal demand, and counsel as against that has set up the limitation of the policy and we cannot recover on that demand in this Court. We cannot ask any equitable relief in this Court upon that ground, and we could not recover on it, and if your Honor gave us a judgment it would be reversed by the Court of Appeals because the pleading of the Statute of Limita-

tions and the fact that it is a purely legal demand divests this Court of any equitable jurisdiction.

Mr. Rowe: As far as the Statute of Limitations is concerned, I will waive that.

Mr. Moses: It is not only pleaded in here, but this Court could not in a Court of Equity give us a mere judgment at law.

The Court: I cannot give you a decree.

Mr. Rowe: They ask for affirmative judgment for $22,000.

The Court: What paragraph?

Mr. Rowe: The last thing before the counterclaim.

Mr. Moses: We will get that out of the way if the Court will allow us on our motion to dismiss that counter claim.

The Court: I will not allow it.

Mr. Moses: I note an exception. If we are not entitled to any equitable relief on that claim, which is a purely legal demand.

The Court: I will allow you to submit briefs. I do not believe you are prepared to argue that question. I am inclined to
392 think if it were not for that counter claim and that prayer, you would be entitled to be dismissed in this Court. With that in, I shall allow you to submit briefs on that question.

Mr. Moses: Does your Honor mean to say that because we have asked a counter judgment that that confers upon this Court equitable jurisdiction to cancel an instrument and enjoin the prosecution of it?

The Court: Yes it is prefectly clear. The ground that there is an adequate remedy at law is a ground that the defendant had the right to waive any time and they can do it. The Court having jurisdiction over a question of fraud as it has, and if the defendant waives the right to insist that the case be tried at law, he subjects himself to the jurisdiction of a Court of Equity.

Mr. Moses: On his counter claim?

The Court: No; on his whole case.

Mr. Moses: Your Honor will recall that this record reserves the decision on our motion to dismiss until the trial of this case.

The Court: I do not know anything about that. Did you make the motion to dismiss before you filed your answer?

Mr. Moses: It was reserved by the Court.

The Court: I think it is clear, I am quite certain, it is a nice point, and it is too late to hunt the authorities up, but my
393 impression is that you cannot stand on your motion to dismiss if you come in and ask for affirmative relief. There is a Supreme Court case dealing with a very similar question. For example, here is a case. A defendant was sued in a State Court. He asked the right to remove the case to the United States Court. The State Court, wrongfully, as the Supreme Court held, refused him the right to remove, and then he went on and asked affirmative relief, and he lost the case, and took the case finally to the Supreme Court of the United States, and they said he had a perfect right to come there and have the judgment reversed if he had stood on his motion to remove and simply defended himself. But the moment you come in and ask for the affirmative assistance of the Court you

396

PLAINTIFF'S EXHIBIT No. 1

HARTENFELD BAG CO.

312-16 N. CARPENTER ST.

No. ~~3806~~ 3933

Oct 3rd 19 18

PAY TO THE ORDER OF

$2107 87/100

$2107 AND 20 CTS

DOLLARS

To FOREMAN BROS. BANKING CO.

MEMBER FEDERAL RESERVE SYSTEM

2-27

CHICAGO.

HARTENFELD BAG CO.

TREASURER

EXAMINED

OCT 3 1918

CHICAGO

PAY TO THE ORDER OF

Any Bank, Banker or Trust Co.

A. M. HEROSTROM, Cashier.

PAID THROUGH CHICAGO CLEARING HOUSE

OCT 3 1918

For deposit only to the credit of

AMERICAN MILLS COMPANY

ATLANTA, GA.

Oct 3rd 1918

Chicago, Ill.

Pay to the order of any bank, banker or trust company

All prior endorsements guaranteed

Hartenfeld Bag Co.

re in that Court and have got to stay there. That, I think, is the law.

Mr. Moses: That involves the jurisdiction of the person.

The Court: Here you blow hot and cold, and say the Court has not any jurisdiction and you come along and say, "Give us a judgment for $22,000." I will give you until the 26th to file briefs.

Mr. Rowe: There is one thing I desire to do before closing, I wish to withdraw the second defense in the reply to the counter claim.

Mr. Moses: What is that?

394 Mr. Rowe: That Mr. Hartenfeld is not a party to this action.

The Court: You can withdraw that.

Mr. Moses: If the Court is going to deny our right to withdraw it, I think the Court ought to deny their right.

The Court: The Chancellor exercises his sound discretion to do justice.

Mr. Moses: I appreciate that, but I was wondering why a motion of that kind should be granted when our motion is not granted.

The Court: In that particular case I am doing simply nothing but this. He has raised a defense that he cannot be sued on that counter claim, because Hartenfeld has not been joined. I am not certain by any means that that is a good defense any way; but if he chooses to say that he does not set up that defense, he is entitled to do that. I believe there are certain classes of cases when they are presented to the Court, that the Court's fundamental duty is to do justice. I can see no other way of doing justice here. I expect to use the full limits of the law to prevent the perpetration of what seems to me to be a scandalous fraud.

Mr. Haas: Would your Honor allow us to put that question in the brief, the right to withdraw that plea, because that is a jurisdictional question.

The Court: No, I do not care to have anything to do with it.

395 Upon motion of Defendant's Counsel the Court denied the motion to dismiss the Counter-claim, to which an exception was taken.

Upon motion of the Plaintiff's Counsel the Court granted that the second defense in reply to the Counter-Claim be withdrawn, to which objection was made and exception taken by Defendant's Counsel.

(Here follow diagrams marked pages 396 and 397.)

398 & 399 EXHIBIT 3 ANNEXED TO DEPOSITION TAKEN AT CHICAGO, ILL., AUGUST 12, 1919.

Western Union Telegram.

Sept. 27, 1918.

American Mills Co.,
Atlanta, Ga.:

Nothing accomplished as yet will wire late today or tomorrow definitely and hold commercial reply.

ARMAND MAY.

Paid Hymkt 6543.
Hartenfeld Bag Co., 312 N. Carpenter St.
Phoned.

EXHIBITS 4 AND 5 ATTACHED TO DEPOSITION TAKEN AT CHICAGO, ILL., ON AUGUST 12, 1919.

These exhibits are the contract shown in paragraph 22 of the complaint herein and printed at page 10 of this record.

(Here follows reproduction of Plaintiff's Exhibit No. 1, marked pages 400, 401, 402, 403, 404, and 405.)

PLAINTIFF'S EXHIBIT No. 6

A. PAGES ALL COMMUNICATIONS TO COMPANY

A.B.C. CODE

BURLAP BAGS

BAGS FOR COTTON SEED MEAL, FERTILIZER, SUGAR CANE, ICE, PRODUCE, COAL, LIME, COFFEE, FLOUR, GRAIN PRODUCTS AND every known purpose.

NEW & SECOND-HAND BAGS

American Mills Co.

BAGS BURLAP

REAL PHONE MAIN 6001 CABLE ADDRESS "ARMAND"

A CORPORATION.

SECOND HAND SEWED BURLAP FOR EVERY PURPOSE

SELLING AGENTS FOR BEFORD & WESTHAMPTON MANUFACTURING CO. SUPERFINE WHITE CLOTH SEWED BURLAP CUTTINGS AND ASPEC CLOTH SUGAR BAG CLOTH for 10-0 & 12 COTTON & LINTONS BAGGING AND TIES FOR BALES PATCHES SEWING TWINE

GENERAL OFFICES.

Atlanta,Ga.,U.S.A.

10-1-1918

PLEASE REFER TO OUR FILE

ALL QUOTATIONS SUBJECT TO PRIOR SALE AND TO CHANGE WITHOUT NOTICE. ALL CONTRACTS ARE CONDITIONAL UPON STRIKES, FIRE, ACCIDENTS, INABILITY TO SECURE CARS, AND OTHER CAUSES BEYOND OUR CONTROL. CANCELLATIONS NOT ACCEPTED

STATEMENT OF ACCOUNT AGAINST HARTENFELD BAG COMPANY.

Notes in payment of invoice August 29th	$9835/00	—
Notes of Hartenfeld Bag Company payable to American Mills Company.	9035.08	—
On three shipments of Coffee Bags of five thousand each to replace shortage on original shipment of twenty thousand Coffee Bags on which only five thousand were shipped 833 bags	265.92	—

Rejected bags at [illegible]

Savannah, Ga., 12,500. a difference in market value 1¢ per bag 1761.20

Amongst shipment made to Savannah Guano Co., one lot of five thousand bags net coffees, difference of 16¢ a bag 800.00

28,000 Meal Bags allowance 8¢ a bag . . . . . .
On 1/4 of shipment, 7,000 bags.

TOTAL $21,647.20.

500
$21,087.20

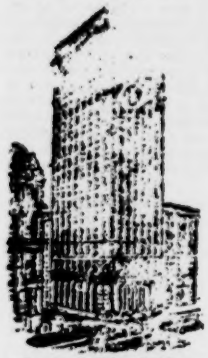
Paid Twenty One Eighty

"At Your Service"

NOTE—If the required information is not given in response to the foregoing questions, return this blank for completion. The answers will be treated as confidential.

Cash on hand,		
Cash in ..... Bank (Here insert name of bank)		
Stocks, bonds and similar securities at present market value, as per Schedule B, (Schedule B annexed should be prepared showing in detail the stocks, bonds and securities owned.)		
Notes and accounts not otherwise included herein secured by lien on real estate,		
Notes and accounts not otherwise included herein secured by collateral,		
Notes and accounts unsecured not otherwise included herein,		
Stock of merchandise at cost,		
..... (State generally nature of stock, such as dry goods, groceries, &c.)		
Due for work completed on unfinished contracts as per Schedule C, (Schedule C annexed should be prepared, describing in brief each contract unfinished, the amount of the contract price, the amount of the work completed, the amount paid on account, and the amount earned but not yet paid.)		
Stock unmanufactured and partially manufactured at cost,		
..... (State here the nature thereof.)		
..... (State here in a general way the nature of the patents.)		
..... (State how the nature of unexpired will.)		
Total Assets,		

PLAINTIFF'S EXHIBIT NO. 1 5 SHEETS. SHEET-1



Company's Office Building
100 Broadway, N. Y.

American Surety Company
of New York.

Capital $5,000,000.

GENERAL CONTRACT OF INDEMNITY

American Surety Co
Ex #1
Sept 16/19

Whereas, the undersigned (hereinafter called the Indemnitor) have heretofore required, and may hereafter require suretyship upon certain obligations of suretyship on behalf of the undersigned, or of some one of them, or of some other person or corporation, and have applied, and may hereafter apply to the AMERICAN SURETY COMPANY OF NEW YORK (hereinafter called the Surety) to execute such instruments, as Surety:

Therefore, the undersigned do hereby, jointly and severally, undertake and agree:

FIRST—That they will pay the Surety at its office, 100 Broadway, in the City of New York, on the day of the date of each such obligation, a premium or charge, for executing such obligation and continuing the same in force for one year, and will thereafter pay a like sum, annually, in advance, until the Surety shall be discharged and released from any and all responsibility upon each such obligation and until the Indemnitor shall serve upon the Surety competent, written, legal evidence of its final discharge from each such obligation and all liability by reason thereof, and the expiration, without appeal or proceedings to review, of the time to appeal from or review any adjudication or determination, directly or indirectly fixing or discharging such liability.

Such premium or charge for each such obligation shall be in accordance with the regular schedule rates published by the Surety.

SECOND—That the Indemnitor will perform all the conditions of each said bond, and any and all renewals and extensions thereof, and will at all times indemnify and save the Surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the Surety deemed necessary) expense, suit, order, judgment and adjudication whatsoever and will place the Surety in funds to meet the same before it shall be required to make payment, and in case the Indemnitor requests the Surety to join in the prosecution or defense of any legal proceeding, the Indemnitor will, on demand of the Surety, place it in funds sufficient to defray all expenses and all judgments that may be rendered therein. The Indemnitor will not ask or require the Surety to remove or join in any application for the removal of any proceeding from a state court to a federal court in any state where such action would in any way affect the Surety's right to transact business.

THIRD—That upon the making of any demand, or the giving of any notice, or the institution of any proceeding preliminary to determining or fixing any liability which the Surety may be called upon to discharge by reason of any such suretyship, and any and all renewals and extensions thereof, the Indemnitor will immediately notify the Surety thereof in writing at its said office.

FOURTH—That in the event of the Surety deeming it advisible, or of the Indemnitor requesting the Surety, to prosecute or defend or take part in any action, suit, or proceeding, appeal or writ of error, the Indemnitor will, on being advised of the Surety's intent so to do, or on the Indemnitor making such request, place the Surety in possession of funds or securities, approved by it, sufficient to defray any costs, charges or expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom, or from its said suretyship.

FIFTH—That the Indemnitor will, on the request of the Surety, procure the discharge of the Surety from any such suretyship, and all liability by reason thereof.

SIXTH—That the Surety shall have every right and remedy which a personal surety without compensation would have, including the right to secure its discharge from its suretyship, and should it make payment thereunder, shall have every right and remedy of the Indemnitor for the recovery of the same.

SEVENTH—That the voucher or other evidence of any payment made by the Surety by reason of such suretyship, or any renewal or extension thereof, shall be *prima facie* evidence of such payment and the propriety thereof, and of the liability of the Indemnitor therefor to the Surety.

EIGHTH—That the Surety also looks to and relies upon the property of the Indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which Indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the Indemnitor and the special benefit and protection of the Indemnitor's property, its income and earnings.

NINTH—That this agreement shall not, nor shall acceptance by the Surety of payment for its suretyship, nor agreement to accept, nor acceptance by it at any time of other security, nor assent by it to any act of the principal named in any suretyship obligation, or of any person acting on behalf of the principal, or of the Indemnitor, in any way abridge, defer or limit its right to be subrogated to any right or remedy, nor limit nor abridge any right or remedy which the Surety otherwise might or may have, acquire, exercise or enforce, nor create any liability on the part of the Surety which would not exist were this agreement not executed.

TENTH—That the liability of the Indemnitor hereunder shall not in any wise be discharged by any alteration, extension or modification of the suretyship under any such obligation herein, which shall have been requested or assented to by the principal in said obligation and by the Surety; but on the contrary, all the terms of this agreement shall apply to any and all such alterations and modifications.

O

SHEET-2

ELEVENTH—The Indemnitor hereby further agrees in the event of being unable to complete or carry on any contract covered by any suretyship of the said Surety, executed hereunder, to assign and does hereby assign to the said Surety, all right, title and interest of the Indemnitor in and to all the tools, plant, equipment and materials of every nature and description that the Indemnitor may have upon the work provided for in the contract covered by said suretyship, or in, on or about the site thereof, including as well materials purchased for or chargeable to such contracts, which may be in process of construction or in storage elsewhere, or in transportation to said site; and the Indemnitor further agrees to assign and hereby does assign to the said Surety, all the former's rights in and to all sub-contracts which may be entered into, and the materials embraced therein appertaining to said contract, and the Indemnitor further agrees in the event of any breach or default on his part in any of the provisions of any contract covered by the suretyship of the said Surety executed in pursuance of such contract, that the said Surety, as surety, shall be subrogated to all the rights and properties of the Indemnitor in such contracts, and that deferred payments and any and all moneys and securities that may be due and payable at the time of such default, or on account of extra work or materials supplied in connection therewith, or that may thereafter become due and payable on account of said contract, shall be credited for any claim that may be made upon the said Surety by reason of its suretyship as aforesaid.

TWELFTH—All the terms and conditions of this agreement shall stand for the protection of any co-surety, any reinsuring company, or any other surety procured by the American Surety Company of New York above named, whether the American Surety Company of New York does or does not execute or retain any portion of any such obligation.

THIRTEENTH—That the Indemnitor renders the following statement of his financial condition at the close of business on the.....day of.....191.....:

FINANCIAL STATEMENT.

(In the case of a firm use additional separate financial statement for each partner.)

NOTE—If the required information is not given in response to the foregoing questions, it will be necessary to return this blank for completion. The answers will be treated as strictly confidential.

ASSETS.

Real Estate as per Schedule A. (Schedule A annexed should be prepared and should describe in detail each piece of real estate owned. State its cost price, its present value, and the nature and amount of encumbrances thereon. The amount should be base entered at its present value without deduction for encumbrances, the amount of such encumbrances being included in the statement of liabilities contra.)		
Plant at cost, $		
Less allowance for depreciation,		
(State here briefly the general nature of the plant.)		
(Patents and good will should not be included therein.)		
Cash on hand,		
Cash in ..... Bank (Here insert name of bank)		
Stocks, bonds and similar securities at present market value, as per Schedule B, (Schedule B annexed should be prepared showing in detail the stocks, bonds and securities owned.)		
Notes and accounts not otherwise included herein secured by lien on real estate,		
Notes and accounts not otherwise included herein secured by collateral,		
Notes and accounts unsecured not otherwise included herein,		
Stock of merchandise at cost,		
(State generally nature of stock, such as dry goods, groceries, &c.)		
Due for work completed on unfinished contracts as per Schedule C, (Schedule C annexed should be prepared, describing in brief each contract unfinished, the amount of the contract price, the amount of the work completed, the amount paid on account, and the amount earned but not yet paid.)		
Stock unmanufactured and partially manufactured at cost,		
(State here the nature thereof.)		
(State here in a general way the nature of the patents.)		
(State here the nature of "good will.")		
Total Assets,		

ELEVENTH—The Indemnitor hereby further agrees in the event of being unable to complete or carry on any contract covered by any surety bond of the said Surety, executed hereunder, to assign and does hereby assign to the said Surety, all right, title and interest of the Indemnitor in and to all the tools, plant, equipment and materials of every kind and description that the Indemnitor may have upon the work provided for in the contract covered by said surety bond, or on or about the site thereof, including as well materials purchased for or chargeable to such contract, which may be in process of construction on storage elsewhere, or in transportation to said site; and the Indemnitor further agrees to assign and hereby does assign to the said Surety, all the former's rights in and to all sub-contracts which may be entered into, and the materials embraced therein appertaining to said contract; and the Indemnitor further agrees in the event of any breach or default on his part in any of the provisions of any contract covered by the suretyship of the said Surety executed in pursuance of such contract, that the said Surety, as surety, shall be subrogated to all the rights and properties of the Indemnitor in such contracts, and that deferred payments and any and all moneys and securities that may be due and payable at the time of such default, or on account of extra work or materials supplied in connection therewith, or that may thereafter become due and payable on account of said contract, shall be credited for any claim that may be made upon the said Surety by reason of its suretyship as aforesaid.

TWELFTH—All the terms and conditions of this agreement shall stand for the protection of any co-surety, any reinsuring company, or any other surety procured by the American Surety Company of New York above named, whether the American Surety Company of New York does or does not execute or retain any portion of any such obligation.

THIRTEENTH—That the Indemnitor renders the following statement of his financial condition at the close of business on the ..... day of ..... 191 ... :

FINANCIAL STATEMENT.

(In the case of a firm use additional separate financial statement for each partner.)

ASSETS.	

Real Estate as per Schedule A, ... (If necessary to

SHEET- 3

LIABILITIES	
Debts secured by lien on real estate as per Schedule A,	
Debts, including notes, secured by collateral,	
Debts due the United States,	
Debts due any State, county or municipality,	
Debts due to laborers or employees,	
Debts, including notes, unsecured and not yet due,	
Debts, including notes, unsecured and past due,	
Reserves, if any ..... (State here generally the nature of the reserves.)	
.....	
.....	
.....	
.....	
*Net Surplus,	

†Doe partners, as follows:

.....

.....

.....

*To be used by an individual only.
†To be used by a copartnership only.
‡To be used by a corporation only.

‡Undivided profits,		
‡Surplus,		
‡Capital Stock, divided into.....shares of $.....each,		
Total Liabilities,		

NOTE.—Items inapplicable may be left blank.
In the case of a co-partnership, similar financial statement from each individual partner should be obtained if the amount of credit required exceeds that warranted by the firm's statement.

SCHEDULE A

405

Plaintiff Exhibit No 1
SHEET-5

STATE OF .....
COUNTY OF ..... } ss.:

Corporation Acknowledgment

On this.....day of.....191.....before me personally appeared.....to me known, who being by me duly sworn, did depose and say: that he resided in the.....that he is the.....of.....the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

STATE OF Illinois
COUNTY OF Cook } ss.:

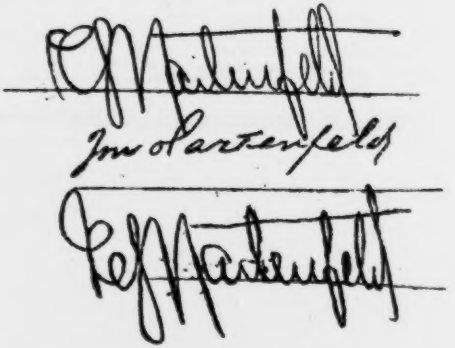
Corporation Acknowledgment

On this 26th day of June, 191 6, before me personally appeared E. J. Hartenfeld, to me known, who being by me duly sworn, did depose and say: that he resided in the City of Chicago that he is the President of Hartenfeld Bag Company the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that

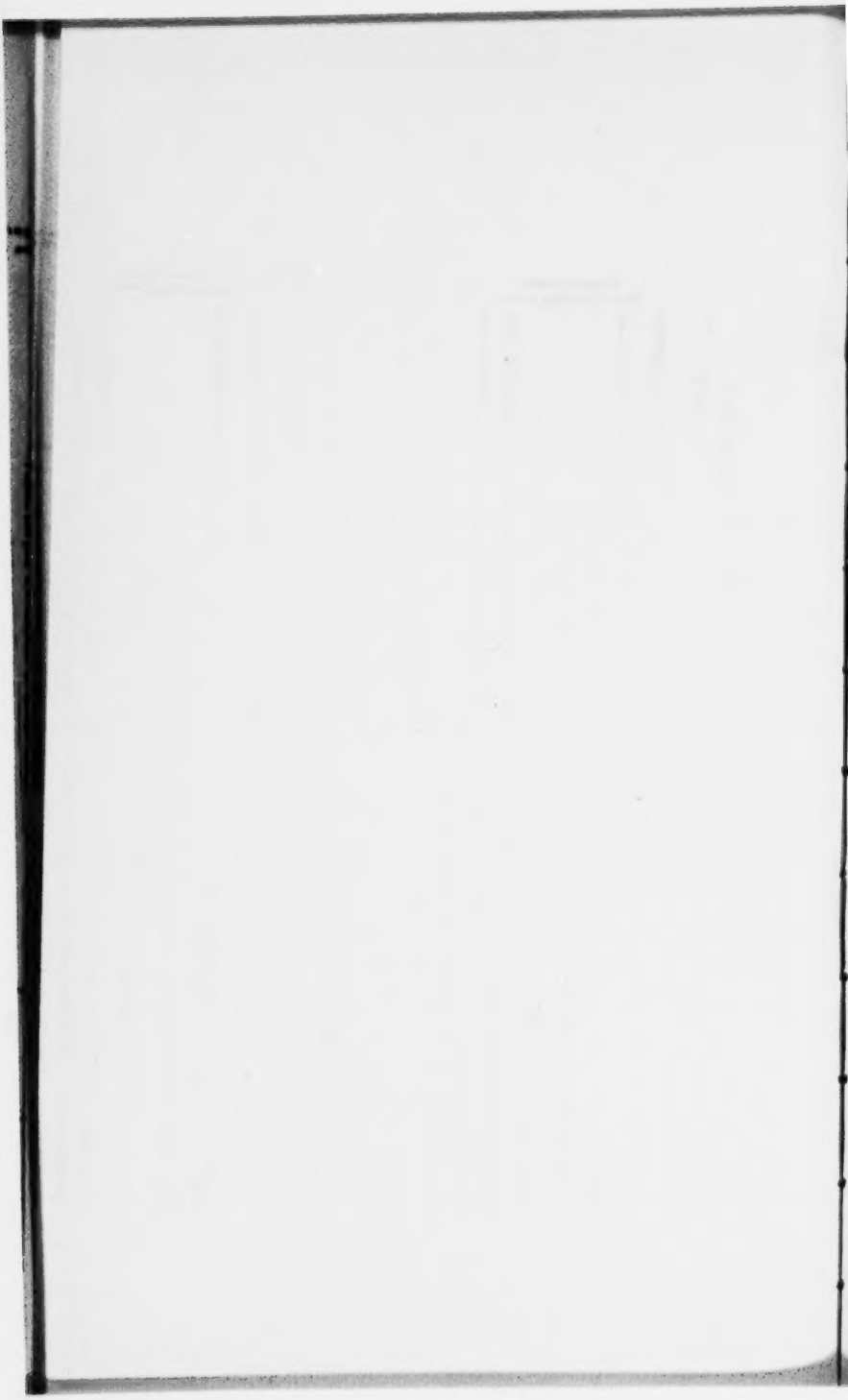
The Indemnitor hereby certifies that each statement hereinbefore contained is true and that this statement is made for the purpose of inducing the AMERICAN SURETY COMPANY OF NEW YORK to execute certain bonds or undertakings without demanding collateral security for the full amount thereof.

Signed and sealed ..... 191 18.

Signed, sealed and delivered in the presence of:



(4) (Acknowledge signatures on next page.)



406 & 407 PLAINTIFF'S EXHIBITS ANNEXED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, ON SEPTEMBER 25, 1919.

PLAINTIFF'S EXHIBIT 1 ANNEXED TO DEPOSITION TAKEN AT ATLANTA, GA., ON SEPT. 25, 1919.

This exhibit is the check, Exhibit No. 1, of deposition taken at Chicago, Ill., on Aug. 12, 1919 and printed on page 396 of this record.

PLAINTIFF'S EXHIBIT 2 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

This is the statement Exhibit 6 of deposition taken at Chicago, August 12, 1919, and printed at page 400 of this record.

408 PLAINTIFF'S EXHIBIT 3 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

(Letterhead of American Mills Co.)

Atlanta, Ga., U. S. A., June 25th, 1918.

(A. M./L. G. R.)

Mr. E. J. Hartenfeld,
% Hartenfeld Bag Co.,
312 No. Carpenter St.,
Chicago, Ill.

DEAR MR. HARTENFELD:

I note with interest your charge No. 1673 and No. 1674 covering item of $256/01 and $98.10, for interest.

Are you putting this in your books in order to increase your sales, or do you expect us to pay same?

We do not find where you have made deliveries on this and we are very much surprised.

Now, Mr. Hartenfeld I want to call your attention to the agreement with reference to these bags. You understand that we remitted the notes under a certain agreement and that the entire lot was supposed to be shipped before these notes became due.

What are you going to do with reference to these deliveries?

409 Let's have this thrashed out before these notes become due so there will be no possibility of a misunderstanding, and we sincerely hope that we can do some business without the necessity of having these unfortunate misunderstandings.

Taking up the subject of interest, we want to call your particular attention to the subject of the item of Stein Bag Co., which is being returned.

If you will look up your records on this you will find that the

American Mills Company have been out of their money without any thought of interest for about nine months.

Have you ever considered our side of these transactions or not?

In order to be a really big man you have to look at the matter from two angles and if you will do his you will find that in all your business experience you have never found anybody who is quite as charitable and lenient as the American Mills Company have been towards you, and we think you should handle us in a little different manner.

If we are not entitled to it, then we ought to know it.

The writer feels very much put out at the treatment which we are receiving, and we are surprised at these charges for interest.

We await with considerable interest your reply, going into all matters, especially the matters of which we wrote you yesterday.

Yours very truly,

AMERICAN MILLS COMPANY.

410 PLAINTIFF'S EXHIBIT 3 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

Date, June 20, 1919.

Entered—Hartenfeld Bag Co., Chicago, Ill.
Shipped via No. 1674.
Shipped to American Mills Co., Atlanta, Ga.
Terms, Net.

Interest on sixty day note amounting to $9,150.00 from May 10th to July 10th 60 days	91.50
Revenue	1.10
Exchange	5.50
	$98.10

411 PLAINTIFF'S EXHIBIT 4 ATTACHED TO DEPOSITION TAKEN — ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

(Letterhead of American Mills Co.)

Atlanta, Ga., U. S. A., 7-6-1918.

(A. M./L. G. R.)

Hartenfeld Bag Co.,
312 No. Carpenter St.,
Chicago, Ill.

GENTLEMEN:

We duly received your telegram and we promptly wired you that Mr. Lovitt was away. We are expecting him about Monday of the coming week. In the meantime, however, we note that you are going to get out fifteen thousand Insides. This is a mighty small shipment in proportion to the amount that you are due, and we sincerely hope you will get these off promptly.

You have agreed, as you know, to make certain deliveries and we hope that nothing will happen to keep you from making same.

We hope, also, that you will realize how important it is that you see to it that the bags which we get are first-class quality, full count, and the shipments move as they should move.

It has got to the point now where we cannot afford to deal with you unless we know we are going to get this kind of service,
412 as it makes it too expensive, and we lose customers, we lose our reputation and we lose our profits.

What we want to do is to sell goods and after we sell them be through with it. We can buy goods from others without having this trouble and it seems to us that we should be able to buy from you as your facilities are such that you should be able to supply the proper goods and not make your profits on goods which are not up to quality.

You can realize now that your reputation is at stake as much as ours.

Yours very truly,

AMERICAN MILLS COMPANY.

413 PLAINTIFF'S EXHIBIT 5 ATTACHED TO DEPOSITION TAKEN — ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

(Letterhead of American Mills Co.)

Atlanta, Ga., U. S. A., 7-9-1918.

(A. M./L. G. R.)

Hartenfeld Bag Company,
312 No. Carpenter St.,
Chicago, Ill.

GENTLEMEN:

Important.

We note with considerable interest yours of July 3d.

With reference to the Stein Bag Company, we hardly think it is fair to ask us to wait until these bags are returned. You realize that we have already paid you for these bags many, many months ago—in fact nearly a year ago.

With reference to the Inside Coffee purchase, this is something which we want to get adjusted before the 20th, when your note becomes due, because as you know, this note must be paid.

Before we purchased these bags from you, you advised us that positively no matter what happened this shipment would go forward long before the due date of the note.

Now, there is only one thing that we can suggest and that is whatever amount is short in the shipment up to the time the
414 note is due that you send us your check to reach us not later than the 19th of the month so we can take up this note, and, of course, if you cannot take care of it, we will be willing to extend that part for another thirty days. In other words, give you

our note for the difference for thirty days and give you an opportunity to take care of it, but on the balance of the notes, we expect the bags to be shipped before this time.

We think the time has now arrived when you should be willing to go into your pocket and handle the matter. You advised us before that you did not want to put out your money for purchases, but it seems that you have not put out any money at all on a basis of shipments.

We can't afford to handle business in this indifferent manner.

We think that the shoe should be put on the other foot, and that Hartenfeld ought to be willing to do something for us.

Please understand that we will not take care of this note except on the above basis, as we are not going to put out our money on a different basis from that agreed, but we hope and trust you will be able to ship considerably more than 15,000 this week and the balance before this note becomes due.

We await with interest your reply, and also please don't forget that you are still due ten thousand inside coffees to Macon, Ga., which have to be replaced, and the bags must be as represented.

415 It seems to us now that you have had sufficient opportunity to see that our trade knows what they want and while it might be true that two out of five cases they will accept anything you ship, the others complain more than to offset any advantage which you might gain. Therefore, as a protection to yourself as well as to us, you should see to it personally, that we get what we buy, and outside of this, if you will instrust your people to pack the goods according to certain specifications there should be no difficulty in having the goods shipped accordingly.

This letter is very important and we hope to hear from you promptly so there will -- no possibility of a misunderstanding

Yours very truly,

AMERICAN MILLS COMPANY.

416 PLAINTIFF'S EXHIBIT 6 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

(Letterhead of American Mills Co.)

Atlanta, Ga., U. S. A., 7-16-1918.

(A. M./L. G. R.)

Hartenfeld Bag Co.,
312 No. Carpenter St.,
Chicago, Ill.

DEAR MR. HARTENFELD:

Referring to conversation had with you over 'phone, in order to help you again we have decided to pay this note upon your assurance that you are going to personally look after this business as quickly as possible.

There are several things as you know that have been giving us

serious trouble, and which have made us lose confidence in E. J. himself as well as the Hartenfeld Bag and I will give you a little information regarding this so you will see why it is we have made up our mind that it will be best for you to come here and straighten these matters out.

Take, for example, on the bags which are now for the Stein
417 Bag Co., this matter has been hanging fire for practically a year. We have been begging you and urging you to give this attention. Then eventually when you do ship the goods and tell us that the goods are absolutely correct, we find that they are not as represented.

Take, for example, on the shipment to Savannah, Ga. We call you attention to this transaction. We note what you state with reference to some of these bags being sold to other dealers, but as far as the last shipment is concerned, of the 40 bales, on which only 10 bales were shipped, please bear in mind that your original B/L called for 10 bales and was increased from 10 to 40, and was not originally marked 40 and reduced to 10. Therefore, we cannot see how there is any possibility of further bales being lost, when only 10 bales left your warehouse and the B/L called for 40.

Now, with reference to the shortage on the bags which were shipped to Savannah, this must be adjusted, and there is no need of putting it off because we have been placed in a very embarrassing position, and you must bear in mind that there are not very many people who are as charitable in their views as we are, and this concern in Savannah does not look with relish upon anything like this, as they feel that it is getting money under false pretenses, and it is.

Then on top of this take for example the ten thousand bags which you shipped to Savannah, which were No. 2 and should have been
No. 1. These were returned and have never been replaced.
418 It does not take a Philadelphia lawyer to figure this out.

For example, also take the shipment which went to Norway, S. C. You recall the circumstances surrounding this, and here again the B/L firstly called for a certain thing and was later changed to a larger number. We had trouble and are still having trouble on this thing, altho you have made this good, but we are having trouble on our own responsibility.

Then take for example on sewed burlap. We purchased a certain grade of No. 1 sewed burlap from you and what was shipped for example to Albany, N. Y. was No. 2 stock.

As explained to you before, we want to feel that when we buy goods from you we do not have to go behind you and trace it up, but that the goods will be as represented in every particular.

It is much better because so far instead of our transactions with you being profitable, they have been very costly to this company, and we have come to the conclusion that we are going to do business with you if possible, but it is going to be done on a different plan.

The mere fact that we think we can make $1.50 or $2.00 a thousand on bags and later on we find we have so much correspondence and so much worry and lose so much money, does not make it very profitable business.

We do not see how you have been successful in working up your business to such a large proportion if you treat others as you
419 have treated us. Of course, we realize that when we first started we were green and dealers could take advantage of us, but goodness you could not expect this to last forever.

Let's face the situation as it is and see if we cannot treat each other fairly.

We expect to see you here Saturday.

Yours very truly,

AMERICAN MILLS COMPANY.
A. MAY.

420 PLAINTIFF'S EXHIBIT 7 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

(Letterhead of American Mills Co.)

Atlanta, Ga., U. S. A., 7-18-1918.

(A. M./L. G. R.)

Mr. E. J. Hartenfeld,
c/o Hartenfeld Bag Co.,
312 No. Carpenter St.,
Chicago, Ill.

DEAR SIR:

We sincerely hope that the additional 15,000 Coffees which you agreed to ship are already in route.

We are also very anxious to hear from you with reference to the bags which were to be replaced at Macon, Ga.

Frankly speaking, nothing in our business career has given us as much worry as our recent transaction with you, and it is evident that we are placing entirely too much confidence in you.

Mr. Lovitt has gone into this matter with you and there is no use of re-opening it, but your promises to us must be taken care of and shipments must move.

421 We are taking care of this note but we can assure you that when the balance becomes due the goods will have to be taken care of, or otherwise we will not take care of your notes.

We want to put you on notice in due time because we have done everything we can and we feel that the time has come now when a matter of this kind should be up to you.

We sincerely hope that full shipments are moving forward and that you will not permit yourself to be criticised further.

Yours very truly,

AMERICAN MILLS COMPANY.
A. MAY.

422 PLAINTIFF'S EXHIBIT 8 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

(Letterhead of American Mills Co.)

Atlanta, Ga., U. S. A., 8-28-18.

(A. M. / L. G. R.)

Mr. E. J. Hartenfeld,
c/o the Hartenfeld Bag Co.,
312 No. Carpenter St.,
Chicago, Ill.

DEAR MR. HARTENFELD:

I have been away from the City for two weeks and upon my return I learned with considerable disappointment that practically nothing has been done with reference to the adjustment of your account.

It seems to me that you would impress upon your associates, if it is not possible for you to personally attend to this, to fulfill your obligations promptly.

Have you ever heard about the little boy who was attending a flock of sheep and for sport he would blow the horn for danger telling them that the wolf was near to eat up the sheep. This little boy did this for about a half dozen times and at one time there were really some wolves but when he blew his horn no one
423 would listen. Now, this in a great measure applies to you.

You have been making promises to me which are in a great measure like Germany's Treaty—simply a scrap of paper..

I now call upon you in all sincerity and all good faith to make good. I do not care to question your sincerity, but there is nothing for me to do when you repeatedly fall down in every sense of the word.

For example, take on the shipment of Inside Coffee Bags for our account to Huntsville, Ala. We shipped this concern about five years ago and had a fuss with them. This time we shipped them again and instead of giving them #1 Insides we gave them about #3's.

I do not believe that it is your desire to try and put the American Mills Company out of business, but you have persistently been harming us in a great measure—not willingly but unwillingly, because when we buy something we expect to get what we buy and the mere fact that we do not see it does not give you a license to try and "put one over." Your experience in this line certainly should have taught you that it is poor business on your part to treat us in this fashion.

For example, you told me positively that you would look after the Courteen Seed Company. Up to this writing this has not been disposed of.

With reference to the Savannah Shortage and the Savannah re-

placement of bags, you assured me without fail that you
424 would make good upon this, and so far I haven't seen a thing done towards this and it is now nearly a month since this time.

Further than this, I want to call your particular attention with reference to the car of bags for Baltimore. At that time you advised me that you were working on Government business but that you would ship this car of bags within a week. In order not to embarrass you when I returned to Atlanta I advised them that this car would be shipped within two weeks, feeling if I gave them this information I would be on the safe side. Here it is now nearly four weeks and no bags are shipped, altho you positively promised to ship them within a week.

Mr. Lovitt tells me that you have offered us some No. 1 Bleachery Sewed Burlap. I am wondering whether or not this is actually Bleachery Sewed Burlap. Also some other bags, all of which you guarantee, but will the goods come up to your guarantee?

I want you to think this letter over very, very carefully, and I want you to write me once and for all, frankly, just exactly what I may expect and further than this, how you would treat were you in my place, if I had treated you in the same fashion that you have treated this company.

I await with considerable interest your reply, and in the meantime I hope that some evidence of your good faith has been accomplished, for you must realize that we have taken care of you
425 in these two notes, and we feel that you should not permit us to suffer further.

I await with interest your reply and assure you that I shall be of open mind until I hear from you fully.

Yours very truly,

AMERICAN MILLS COMPANY.
A. MAY.

426 PLAINTIFF'S EXHIBIT 9 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

(Letterhead of American Mills Co.)

Atlanta, Ga., U. S. A., 9-3-1918.

A. M. / L. G. R.)

Mr. E. J. Hartenfeld,
c/o Hartenfeld Bag Co.,
312 No. Carpenter St.,
Chicago, Ill.

DEAR MR. HARTENFELD:

You recall you recently shipped us some bags for the Stein people which you claimed personally were much better than what you shipped before.

To our surprise and disappointment this car has just come in and we have the same complaint as before.

It is discouraging—it is disgusting—and it is humiliating for us to try and deal when we have been treated in this fashion.

Is it not possible to arrange in some way so we can obviate these unnecessary and unbusinesslike transactions?

What can we do in a case like this when we assure a man that the goods will be right and when they come they are worse?

427 You might feel that simply because you are willing to take care of us that you are doing your part. This is not satisfactory. It causes us entirely too much time to take up in making these adjustments which arise on every shipment.

We await your reply.

Yours very truly,

AMERICAN MILLS COMPANY.
A. MAY.

428 PLAINTIFF'S EXHIBIT 10 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

(Letterhead of American Mills Company.)

Atlanta, Ga., U. S. A., 9/19/1918.

(A. M./L. G. R.)

Mr. E. J. Hartenfeld,
c/o Hartenfeld Bag Co.,
312 No. Carpenter St.,
Chicago, Ill.

DEAR MR. HARTENFELD:

Under date of August 28th we addressed to you a letter which was returned as you will note it was addressed to Philadelphia instead of Chicago.

Up to this writing we have not received the B/L covering the shipment of bags to Baltimore as per your promises, so this letter will be more in keeping now, especially in view of the fact, also, that the bags which you shipped to Atlanta to Stein proved to be a worthless lot.

We wish it was possible for you to come to Atlanta yourself to try and get these matters adjusted.

Also let me know what was done with the Courteen Seed Co., of Milwaukee.

We await with interest your reply, and we hope that your
429 outside ventures are proving very very profitable, because evidently you must be neglecting your own business on these outside matters, and this is proving very harmful to the American Mills Co., and very, very unprofitable.

With every good, and while we are a little late and you have been a bad boy all through the year, we still offer you our best wishes for a prosperous and happy New Year.

We hope, however, that you will profit by the experience and realize that an injustice has been done to us during the past year and that you will try and see to it that we do not suffer further.

Awaiting with considerable interest your further treatment of us, which we hope will be altogether different from the past, we are

Yours very truly,

AMERICAN MILLS COMPANY,
A. MAY.

430 PLAINTIFF'S EXHIBIT 11 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

Date, Aug. 29, 1918.

Entered, Hartenfeld Bag Co.
Shipped Via I. C., Chicago, Ill., No. 1794.
Shipped to Order No. —, Mr. Lovitt.
Terms, Net 90 days.

50,000 Meals @ 137.50	$6,875.00
10,000 lbs. burlap @ 23½c lb	2,350.00
	$9,225.00

#4952-5086.

PLAINTIFF'S EXHIBIT 12 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

This exhibit is a telegram appearing in this printed record at page 273.

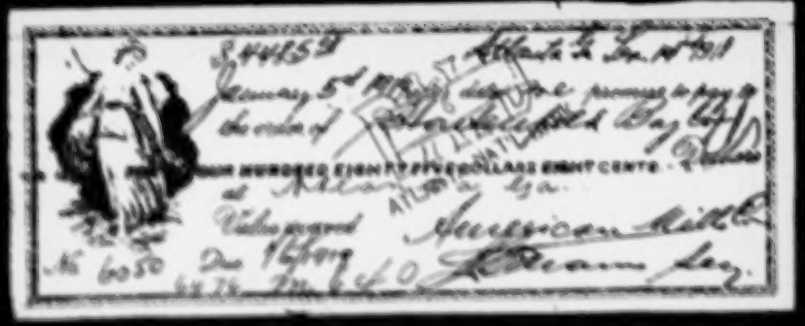
PLAINTIFF'S EXHIBIT 13 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

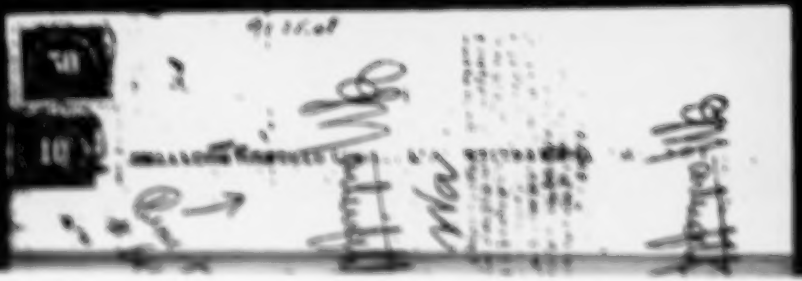
This exhibit is a telegram appearing in this printed — at page 274.

(Here follows reproduction of Plaintiff's Exhibits Nos. 14 and 15, marked page 431.)

PLAINTIFF'S EXHIBIT No. 14

COPY OF AMERICAN SURETY COMPANY'S
EXHIBIT No. 14 - of Sept. 26, 1919.

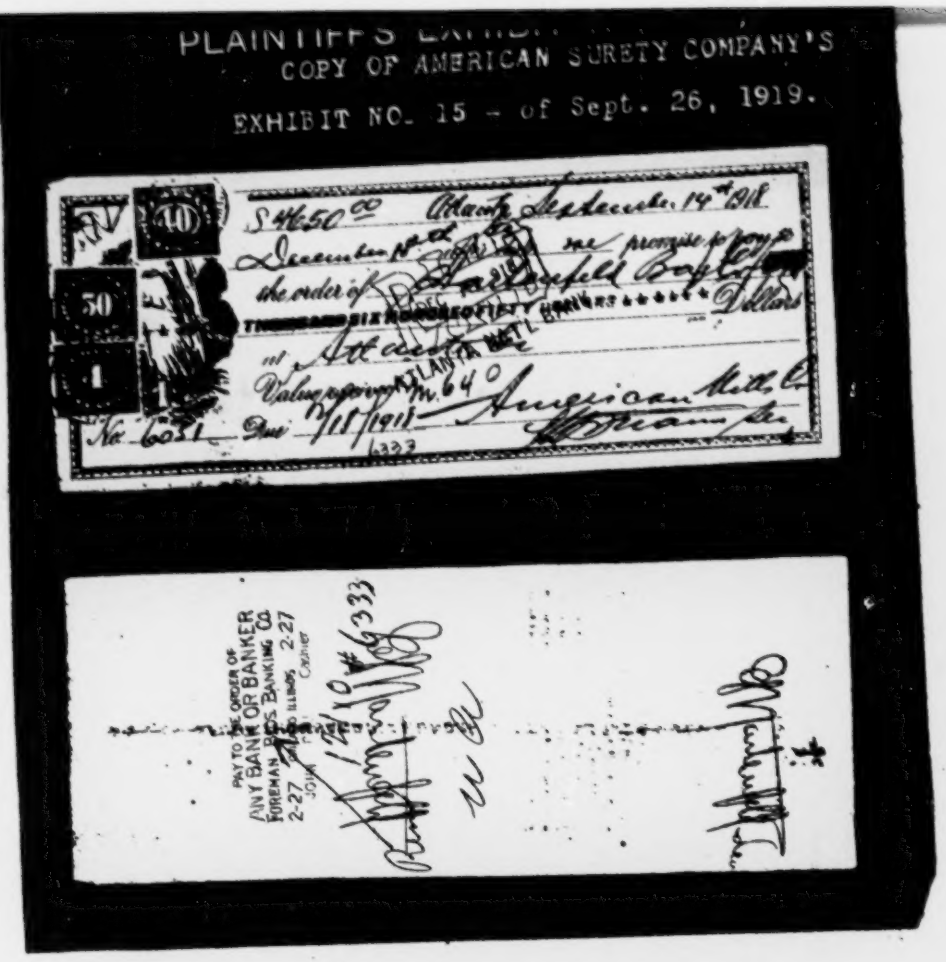


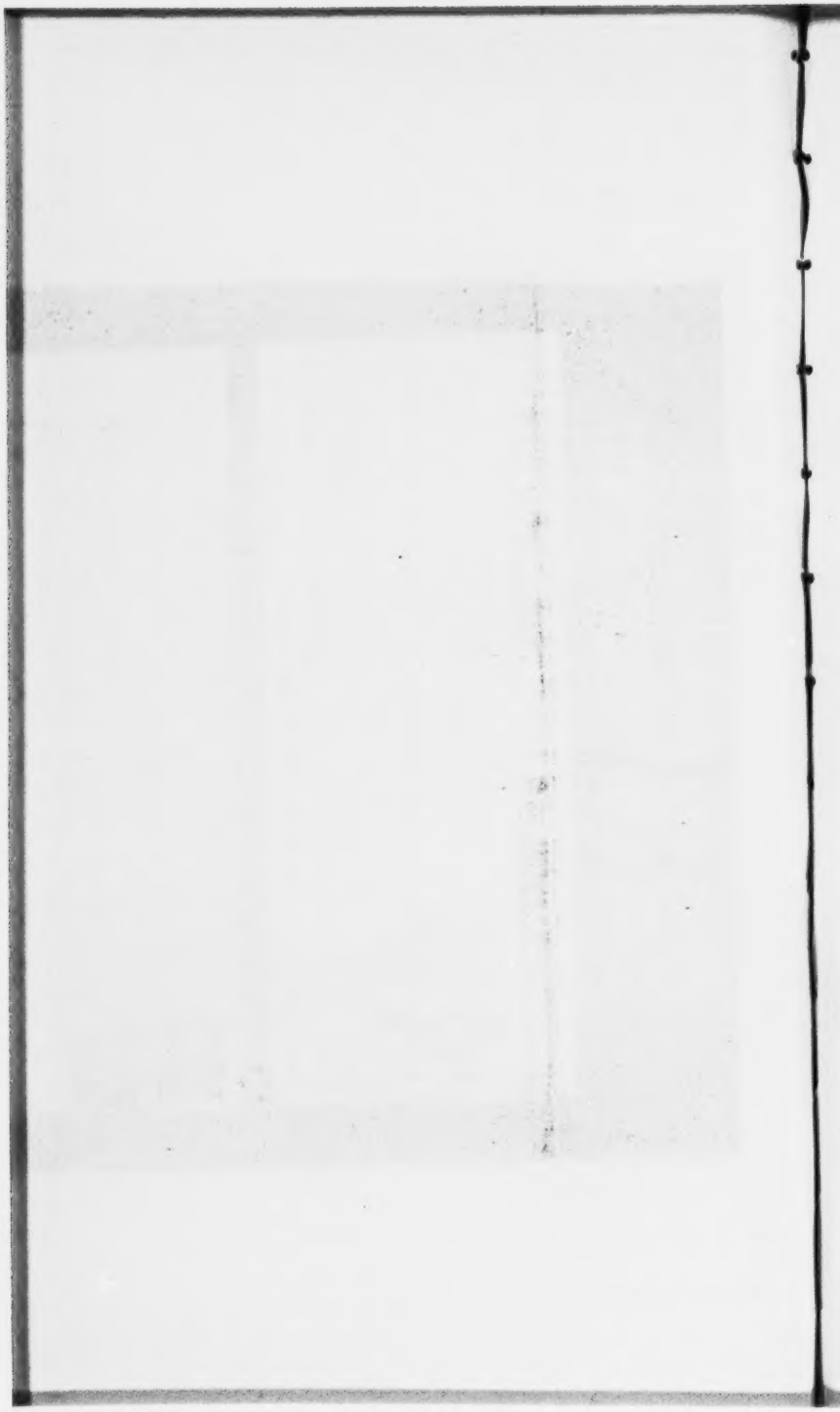


PLAINTIFF'S EXHIBIT

COPY OF AMERICAN SURETY COMPANY'S

EXHIBIT NO. 15 - of Sept. 26, 1919.





432 & 433 PLAINTIFF'S EXHIBIT 16 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

Western Union Telegram.

Received at 935 W. Randolph St. Phone Wabash.
4321 Local 16 A 39 CH NH 14 COLL
WB Atlanta Ga 10 48 Sept 24 18

Hartenfeld Bag Co.:

Will buy coffees after you ship bags you owe us for Savannah.
AMERICAN MILLS CO.

38 p. m.

434 PLAINTIFF'S EXHIBIT 17 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

Western Union Telegram.

Received at 935 W. Randolph St. Phone Wabash.
4321 Local 16 A 25 CH CP 12 COLL
WB Atlanta Ga 1158A Sept 24 18

E. J. Hartenfeld:

Arrive La Salle seven Wednesday night meet me without fail wire agreeable.
ARMAND LAY.

123OP.

435 PLAINTIFF'S EXHIBIT 18 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

Copy.

Form D 1–17 . 10M.

Important Legal Notice.

Name, American Mills Co.
Address, Atlanta, Ga.
Debtor to —— ——.

Commercial Credit Company.

Cash Capital, $2,250,000. Surplus, $250,000.

Commercial Bankers.

Seventh Floor, Garrett Building.

Baltimore, Sept. 23rd, 1918.

Formal legal notice is hereby given you, that all right, title and interest in and to each of the invoices owing by you as described

below, and to the goods represented thereby, have been sold and assigned to Commercial Credit Company, Baltimore, Md., its successors or assigns in the usual course of business, and for full value by Hartenfeld Bag Co., Chicago, Ill. All payments,
436 checks, notes, etc., on any or all of said invoices, or claims, return or rejected by you of any of the goods represented thereby must be made Direct to Commercial Credit Company, Baltimore, Md., and to None other; otherwise you will not be released and may be subjected to a Double Payment thereof.

To Invoices Bought by Commercial Credit Company.

Date of invoice.	Due date.	Net cash.	Amount of invoice.
8–29	11–29	.....	9,225.00

Please compare, and advise us promptly whether there are any credits, payments, notes, etc., not shown hereon, stating fully which, if any of said invoices you do not expect, for any reason, to pay in full when due.

Yours very truly,

COMMERCIAL CREDIT COMPANY.

Form of Original Assignment of the Above Accounts.

This is to certify, that the persons named above are indebted to the undersigned in the sums set opposite their respective names, for goods sold, shipped and delivered.

Date of invoice.	Name of debtor.	Address.	Due date.	Net cash.	Amount of invoice.

Space for listing accounts sold hereunder.

437 Dated at —— this — day of —— 191-.

In consideration of One Dollar, receipt of which is hereby acknowledged, and other valuable considerations, the undersigned hereby sells, assigns and sets over to Commercial Credit Company, Baltimore, Maryland, hereinafter designated as "second party," its successors or assigns, all its right, title and interest in and to the accounts receivable and contracts above named, hereinafter designated as "Accounts," with any securities or guarantees thereon, with right to second party of stoppage in transit aggregating — Dollars ($—), Gross, including all moneys due and to become due on same and title to the merchandise represented thereby in case same is not received, is returned, rejected, re-routed or re-consigned, and title to any new account, contract or merchandise created through the re-sale or exchange of said merchandise, including any moneys owing thereon.

In consideration of the prompt purchase and remittance by second party for such of the above accounts as are acceptable to second party

without waiting to make a complete credit investigation thereof, the undersigned hereby warrants that: first party and each debtor named in each account is solvent and will remain so until maturity thereof; every account and any note or other settlement re-
438 ceived thereon will be paid in full in cash or Baltimore par funds at the correct maturity thereof as set forth; the above schedule correctly sets forth undisputed accounts now owing to the undersigned for bona fide sales and deliveries of merchandise as specified by the buyer; there are no offsets, contra ac-ounts or counter claims against any of them; and that proper entries have been made on its books disclosing the absolute sale thereof to second party.

The undersigned hereby acknowledges receipt from second party of the above accounts for collection for second party under right and privilege given to the undersigned, subject to termination at any time by second party, and further represents and warrants that: all collections received or credits allowed by it on any and all accounts previously sold or assigned to second party have been duly, properly and regularly credited to the accounts of the respective customers on the books and records usually used for such purpose; all such collections have been promptly forwarded to second party, and that none of said accounts have been sold or assigned to any other party; prompt report with amount thereof has been made to second party of the rejection, return, re-routing, re-consignment or re-sale of any merchandise represented by any account previously sold or assigned to second party.

The accounts as hereinabove set forth are hereby purchased and paid for by second party upon the faith of each of the above warranties of the undersigned.

(Signed) HARTENFELD BAG CO.,
By —— ——,
Asst. Treas.

Accepted by
COMMERCIAL CREDIT COMPANY,
By —— ——,
Asst. Secy.

Chicago, Ill., —— —, 191–.

439 PLAINTIFF'S EXHIBIT 19 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

Western Union Telegram.

September 24, 1918.

Armand May,
c/o American Mills Co.,
Atlanta, Ga.:

Will meet you at La Salle Hotel Wednesday.

EDDIE.

440 PLAINTIFF'S EXHIBIT 19A ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

(Letterhead of American Mills Co.)

Atlanta, Ga., U. S. A., 9/23/18. lgs/b.

Hartenfeld Bag Co.,
Chicago, Ill.

Attention Mr. Hartenfeld.

DEAR MR. HARTENFELD:

I return herewith your invoices Nos. 1824-1825, for interest on two notes. In this connection we wish to call your attention to the fact that it is absolutely incorrect.

You will recall that these goods were sold on the basis of 90 days, and therefore by our giving you these notes we only helped you out in the way of giving you the use of this money; however, we had no intention at any time to pay the interest on same, and we believe that upon full investigation you will find that this is an undue request.

We shall be pleased to hear from you further in regard to this matter for we feel sure that our position is correct.

Yours very truly,

AMERICAN MILLS COMPANY.

441 Date, Sept. 17, 1918.

Entered Hartenfeld Bag Co.
Shipped Via Chicago, Ill. No. 1824.
Shipped to American Mills Co., Atlanta, Ga.
Terms, — Net.

Interest on note $4,485.08 from Sept. 14th to Dec. 18th— 102 days	90.44
Exchange	9.00
Revenue	.90
	$100.34

442 Date, Sept. 17, 1918.

Entered Hartenfeld Bag Co.
Shipped Via Chicago, Ill. No. 1825.
Shipped to American Mills Co., Atlanta, Ga.
Terms, — Net.

Interest on note $4,650.00 from Sept. 14th to Jan. 5th— 211 days	79.05
Exchange	9.30
Revenue	.94
	89.29

(Here follows reproduction of Contract, marked page 443.)

said H. Bag shall re
as will pay for such

CONTRACT entered into and
CORPORATION, Atlanta, Ga.,
the HARTENFELD BAG COMPANY
party of the second part.
to purchase and the HARTEN
the following bags at spec
specified conditions as th

25,000 strictly No.
50,000 strictly No.
30,000 lbs. guarant
sewed burlap
F. O. B. Chicago.

Total amount of this cont
hundred dollars ($22,100.0
~~COMPANY agrees to pay cas~~
~~contract is completed with~~
~~data.~~

The HARTENFELD BAG COMPAN
AMERICAN MILLS COMPANY a
an approved company of su
to AMERICAN MILLS CONPANY
guaranty of the faithful

paid H. B. Co upon the execution of this agreement;
the receipt whereof is hereby acknowledged
In the event that said H. B. Co shall not
make complete delivery of said 2nd lot
as in Sec. 7 above provided, then said
remaining 50,000 bags shall be immediately returned to

...of said 22,000 bags as mutually interpreted has been delivered and accepted by A.M.Co, and this H.B.Co shall at the expiration of 15 days thereafter deliver to A.M.Co. the difference between the ...

...D BAG Co.

312 - 318
NORTH CARPENTER ST

...URLAPS

...een AMERICAN MILLS COMPANY
...rty of the first part and
...RPORATION, Chicago, Ill..
...ERICAN MILLS COMPANY agree
...D BAG COMPANY agree to sell
...ed prices, subject to
...in contained.

Inside Coffee bags	@ 30¢ each.
Gold Medal bags	@ 16¢
strictly No. 1	
inch, 8 ounce	@ 22¢ lb.

...is twenty two thousand one
...which the AMERICAN MILLS
...on the conditions that this
...seventy-five days (75) after

...ther agree to furnish to the
...y Bond properly executed by
...anding as will be acceptable
...ich bond is to serve as a
...manner of the terms of this

444 & 445 PLAINTIFF'S EXHIBIT 21 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

This exhibit is the same contract as alleged in the twenty-second paragraph of the complaint and printed at page 10 of this record.

PLAINTIFF'S EXHIBIT 22 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

This exhibit is the telegram annexed as Exhibit 3 to Depositions taken at Chicago, Ill., August 12, 1919, and printed at page 399 of this record.

PLAINTIFF'S EXHIBIT 23 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

This exhibit is the check annexed as Exhibit 2 to Deposition taken at Chicago, Ill., August 12, 1919, and printed at page 397 of this record.

446 PLAINTIFF'S EXHIBIT 24 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

(Letterhead of American Mills Company.)

10/5/1918.

A. M./L. G. R.

Commercial Credit Company,
Seventh Floor Garrett Bldg.,
Baltimore, Md.

GENTLEMEN:

We duly received your registered letter together with your telegram and note carefully what you state.

In the outset, we desire to state that these goods have just been received and we are sorry to state that they are not up to specifications, and there will be quite a serious deduction, so we want to put you on notice now that in making settlement for this invoice we shall only pay according to the value of the goods received.

In the meantime, we presume you can get a letter from the Hartenfeld Bag Company to the effect that this account is to be paid direct to you.

We cannot give you an idea as to the amount of the allowance until we go further into the matter.

Yours very truly,

AMERICAN MILLS COMPANY.

447 PLAINTIFF'S EXHIBIT 25 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

Atlanta, Ga., U. S. A., 10/5/1918.

(A. M./L. G R.)

Hartenfeld Bag Company,
312 No. Carpenter St.,
Chicago, Ill.

GENTLEMEN:

The writer has just returned home and taking up the question of the purchase of bags which we made of you as of Sept. 27th, we want to call your particular attention to the purchase and guarantee of the American Surety Company. In order not to have any complications with the American Surety Company it will be necessary for you to execute this order exactly as per this contract and if there will be any change of any kind as to the deliveries you will have to get the permit of the American Surety Company.

We hope, however, that you will be able to execute the order as per understanding and that you will see to it personally that the quality of the goods are strictly A-#1.

We are very anxious to dispose of this matter without any possibility of a misunderstanding and we trust you will do your share, and we await with interest your reply.

Yours for "The Fourth Liberty Loan,"

AMERICAN MILLS COMPANY.
A. MAY.

448 PLAINTIFF'S EXHIBIT 26 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

(Letterhead of American Mills Company.)

Atlanta, Ga., U. S. A., 10-8-1919.

(A. M./L. G. R.)

Hartenfeld Bag Co.,
312 No. Carpenter St.,
Chicago, Ill.

GENTLEMEN:

With reference to the contracts which we purchased from you, we want to respectfully call your attention to the fact that this Surety Bond is a very specific contract and that it will be necessary for us to live within this contract absolutely. In other words, the only class of burlap we can take is 40" 8 oz. We can only take 25 M A-#1 Inside Coffees and 50 M Gold Medal Bags and any goods that are not delivered, of course, you will have to reimburse us with cash.

We thought it best to make this perfectly clear so you will understand that there can be no extension on this contract and that it must be taken care of within the period.

Just as soon as you have goods ready to apply on this contract please advise and we will give you shipping instructions.

We hope this contract will be completed in short order.

Yours for the Fourth Liberty Loan,

AMERICAN MILLS COMPANY.

449 PLAINTIFF'S EXHIBIT 27 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

Oct. 12, 1918.

American Mills Co.,
Atlanta, Ga.

GENTLEMEN:

Your favor of the 8th.

It is not necessary for us to ship you exactly what the contract provides and if you are satisfied with the amount of money that different items of bags will bring you, this in itself is sufficient. The only way to get through with this contract as quickly as possible is not to be pedantic, and if you think that every item as specified in the contract must be shipped in place the value of the goods that we may have to offer, supposing we ship you other goods and you credit our account with so much money. It works out the same way and we feel sure that you should not hesitate in doing so.

We believe that Mr. Haas can not look at it from any other standpoint. So far as the Surety Company is concerned, naturally, if you are pleased to take other merchandise they will not even care anything about it. So far as the danger is concerned there is none, and if there were we are the only parties who are liable for delivery of certain specific goods.

450 We have the following bags that we will be glad to ship about

5,000 Inside Coffees.
10,000 to 15,000 Gold Medals.
10,000 to 15,000 lbs. No. 1 Burlap, in which there is about 5,000 lbs. 32".
15,000 to 20,000 Meal Bags.

Please let us hear from you, and oblige

Very truly yours,

HARTENFELD BAG CO.
E. F. SUTTON.

E. J. H.-S.

451 PLAINTIFF'S EXHIBIT 28 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

(Letterhead of American Mills Company.)

Atlanta, Ga., U. S. A., 10-16-1918.

(A. M./L. G. R.)

Hartenfeld Bag Co.,
312 No. Carpenter St.,
Chicago, Ill.

GENTLEMEN:

We have yours of October 12th and note what you state with reference to this contract.

We do not want to be overparticular but we have entered into a certain contract with you, and you have given us a Surety Bond that it will be executed, and if the contract is not executed as per the Surety, then you can see our position.

However, if you have any bags to ship outside of the contract, and we can handle these bags as a separate transaction from this contract, and on a basis of present prices, it will be satisfactory, but as far as the contract itself is concerned, we do not want to have anything to interrupt this, directly nor indirectly.

The only bags that we can take on this contract are the bags as outlined and the burlap as outlined, and we trust that you will be able to execute this complete order before the date.

452 We realize that you are the party who is going to make delivery and we are not worried in the least about you, but at the same time, what's the use of getting a Surety Bond if you are not going to live up to it.

This is for our protection as well as yours, and let's go through it in a businesslike manner. All of our dealings in the past have not been handled as they should and we have made up our minds that from now on we are going to do things right or not at all.

We are sure you will agree with us in this and we await your reply.

Yours very truly,

AMERICAN MILLS COMPANY.

453 PLAINTIFF'S EXHIBIT 29 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

(Letterhead of American Mills Company.)

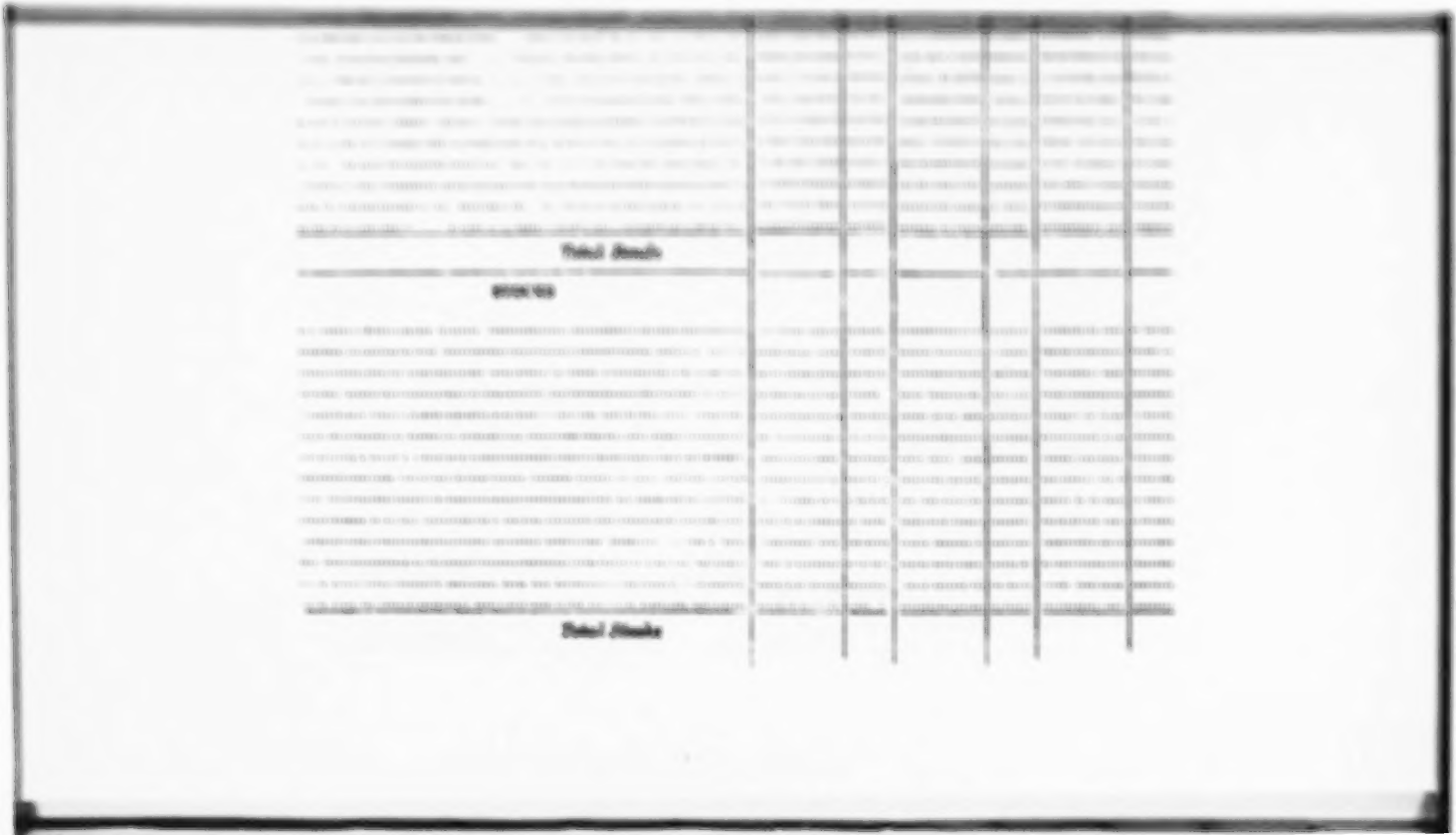
November 29th, 1918.

Commercial Credit Company,
Baltimore, Md.

GENTLEMEN:

Re Hartenfeld Bag Company.

Referring to our night letter of the 21st instant and your several communications we are enclosing you herewith our check payable



DEFENDANT'S EXHIBIT NO. 1 American Mills Co's
Ext for Ddt. aug 13 1919.

C 418 Am. Sec.

American Surety Company of New York

FINANCIAL STATEMENT.

Exhibit No 1
Louis T Moan
United States Commissioner

(In the case of a firm use additional separate financial statement for each partner.)

Give full address 312 -316 N. Carpenter St Nature of business Bags and Bagging

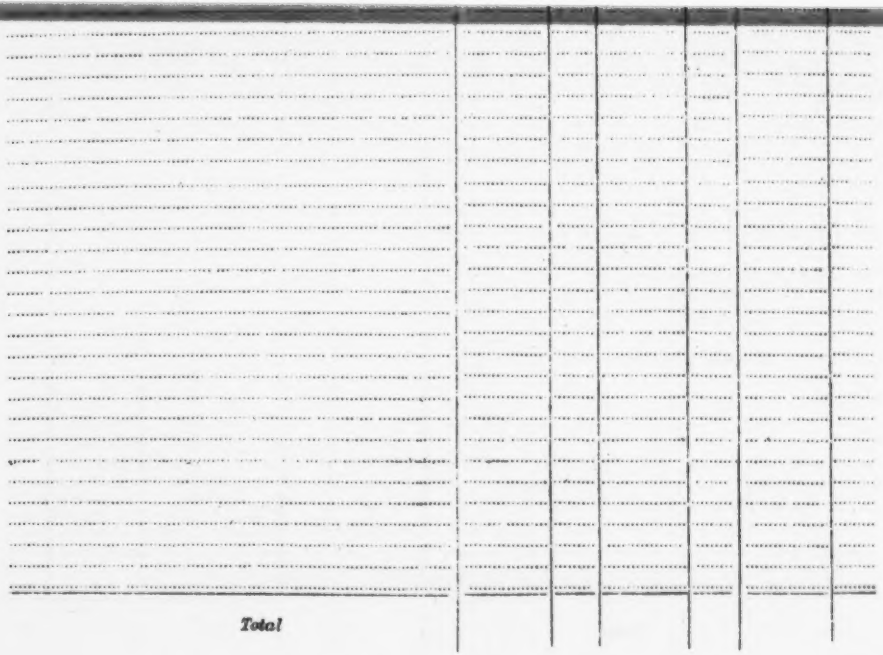
At the close of business on the 31st *day of* August *19*17.

QUICK ASSETS			CURRENT LIABILITIES		
Cash on hand $	110	90	Debts due to laborers or employes		
Cash in ..... Bank			Debts and Notes unsecured and past due (Make separate explanation of this item.)		
Cash in Foreman Bank Bros.	1994	90	Debts and Notes unsecured and not due	9229	65
Cash in ..... Bank			Debts maturing in less than one year secured by collateral	13480	73
Notes and Accounts secured by collateral	38953	42			
Notes and Accounts unsecured					
Stocks and bonds, etc., as per Schedule A attached					
Merchandise at cost finished	65890	00			
" " " unfinished					
Bonds not quoted, contracts, etc.					

Total Quick Assets	106949	22	*Total Current Liabilities*	22710	38
FIXED ASSETS			**FUNDED DEBTS**		
Mortgages and other Assets secured by lien on Real Estate			Debts maturing in one year or more secured by collateral		
Real Estate, as per Schedule C attached;			Mortgages and other debts secured by lien on Real Estate, as per Schedule C attached	12500	00
Land $					
Improvements $	40427	77			
Plant at cost $					
Less depreciation $					
Patents					
Good Will					
Total Fixed Assets			*Total Funded Debts*	35210	38
			RESERVES		
			1.		
			2.		
			3.		
			4.		
			Total Reserves		
			Surplus		
			Capital		
	147376	99	*Net Worth*	112166	61
Total			*Total*	147376	99

No Material change from the above statement on this date June 20th, 1918.

(Over)


Total

SCHEDULE C: REAL ESTATE

DESCRIPTION	Market Value		Mortgages
	Land	Improvements	
Lots 12, 15 & 16 in Block 13 Carpenters Addn, to Chicago with appretnnances	45,000.00 Including appretnnances		125,00.00 on dates of this Statement 8/31/17
			Now mortgage redtced to $10,000.00 June 20th,1918.

to you as assignee of the Hartenfeld Bag Co., for $1,894.52 in payment of the 10,000 pounds of burlap invoiced at $2,350.00.

We have made the following deductions from the original invoice of August 29th, amounting		$9,225.00
50,000 bags rejected	$6,875.00	
Freight on 50,000 bags	353.48	
Labor assorting 25,000 bags	90.00	
Unloading 50,000 bags from car	12.00	
Total		$7,330.48
Check enclosed		$1,894.52

We are awaiting a definite reply from you relative to the 50,000 bags. As wired you on the 21st, we completed an examination of 25,000 of these bags which were rejected, and we await in-
454 structions from you regarding the entire 50,000. We understand that these instructions will be received as soon as you have heard from the Hartenfeld Bag Company.

Yours very truly,

AMERICAN MILLS COMPANY.

S. L.—W.

Encl.

455 PLAINTIFF'S EXHIBIT 30 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

This exhibit is a letter appearing in this printed record at page 237.

PLAINTIFF'S EXHIBIT 31 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

This exhibit is a letter appearing in this printed record at page 243.

PLAINTIFF'S EXHIBIT 32 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

This exhibit is a letter appearing in this printed record at page 261.

(Here follows reproduction of Defendant's Exhibit No. 1, marked pages 456 to 459, inclusive.)

460 DEFENDANT'S EXHIBIT 1 ATTACHED TO DEPOSITION TAKEN AT ATLANTA, GEORGIA, SEPTEMBER 25, 1919.

On the Letter Head of Hartenfeld Bag Company.

Chicago, July 3, 1918.

American Mills Co.,
Atlanta, Ga.

GENTLEMEN:

Your various letters received while writer was absent from town. We are herewith enclosing check for $111.27 in payment of your invoice and also acknowledge receipt of your bill of lading, covering return shipment from Stein & Company. As soon as these bags arrive we will replace same with another shipment as we are anxious to see whether these correspond exactly to what we sent out.

Referring to your letter relative to the interest charges we are cancelling these invoices, which we trust is satisfactory. Although you have really not received many bags on this invoice, still we were obliged to exchange the Savannah bags which tied up 15,000 bags and which would have otherwise been applied against this new contract. However, we will get after same and try to clean up all these matters as quickly as possible and if you will only be patient we will have all matters straightened out.

461 If it will be inconvenient for you to meet the note of July 10th we will be glad to give you our note in exchange, which you can discount, and await to hear from you further. However, it is necessary that this note be paid and we can assure you that we will have all other matters straightened out to your satisfaction.

With best wishes, we are,

Very truly yours,

HARTENFELD BAG CO.
E. J. HARTENFELD.

462 DEFENDANT'S EXHIBIT "A."

Original Petition in the Georgia Suit.

STATE OF GEORGIA,
County of Fulton:

Fulton Superior Court, March Term, 1919.

AMERICAN MILLS COMPANY, Plaintiff,

vs.

HARTENFELD BAG COMPANY, Principal, and AMERICAN SURETY COMPANY OF NEW YORK, Surety, Defendants.

Suit on a Bond.

To the Superior Court of Fulton County, Georgia:

The petition of the American Mills Company respectful-y shows:

463 1. That it is a corporation organized and existing under the laws of the State of Georgia.

2. That the American Surety Company of New York is a corporation organized and existing under the laws of the State of New York having an office and place of business in Fulton County, Georgia and an agent in Fulton County, Georgia, upon whom service may be perfected.

3. That the Hartenfeld Bag Company is a corporation organized and existing under the laws of the State of Illinois.

4. That on or about September 27, 1918, the plaintiff and the Hartenfeld Bag Company entered into a written contract, a copy of which is attached hereto, marked "Exhibit A" and made part of this petition.

5. That on September 28, 1918, the defendants executed and delivered a bond to the plaintiff, a copy of which is hereto attached, marked "Exhibit B" and made part of this petition.

6. That defendant, Hartenfeld Bag Company, under said contract marked "Exhibit A" was to deliver to the plaintiff on or before seventy-five (75) days after date of the contract Twenty-five thousand (25,000) strictly number one inside coffee bags; fifty thousand (50,000) strictly number one Gold Medal bags; thirty thousand (30,000) pounds guaranteed strictly number one sewed
464 burlap and in the event that the defendant Hartenfeld Bag Company, should not make delivery of said merchandise on or before the expiration of seventy-five (75) days after September 27, 1918 (the date of the contract), then the defendant, Hartenfeld Bag Company, was to return immediately, at the expiration of said

seventy-five (75) days, the entire purchase price of Twenty-two Thousand one Hundred Dollars ($22,100.00), from which was to be deducted only so much as would pay, at the contract price, for the merchandise delivered under said contract.

7. That the defendant Hartenfeld Bag Company has delivered under said contract, on or before seventy-five (75) days from the date thereof, only thirty-five hundred (3,500) strictly number one inside coffee bags, at the contract price of thirty cents (30c) per bag, or Ten Hundred and fifty dollars ($1,050.00), and no other bags or burlap of any description whatsoever.

8. That the defendant, Hartenfeld Bag Company, has failed and refused to return immediately at the expiration of seventy-five (75) days after the date of said contract to the American Mills Company the sum of Twenty-one Thousand and Fifty Dollars ($21,050.00),
465 being the balance of the contract price of Twenty-two Thousand One Hundred Dollars ($22,100.00), less the value at the contract price of the merchandise delivered on or before seventy-five (75) days from the date of the contract; the said Hartenfeld Bag Company having failed and refused to deliver to the plaintiff within said specified time all of the merchandise to be by it delivered under said contract within said specified time, the said Hartenfeld Bag Company having delivered only thirty-five hundred (3,500) strictly number one inside coffee bags on or before seventy-five (75) days from the date of the contract as aforesaid.

9. That by reason of the above facts the defendants, Hartenfeld Bag Company and American Surety Company of New York became indebted to the plaintiff, under said bond, for said sum of Twenty-one Thousand and Fifty Dollars ($21,050.00).

10. That on December 14, 1918, plaintiff, through its authorized representative, by registered mail, notified the said defendant American Surety Company of New York, of the default of the said Hartenfeld Bag Company under said contract and bond, and demanded payment of said sum of twenty-one Thousand and Fifty Dollars ($21,050.00); a copy of said notice by the plaintiff to the defendant American Surety Company of New York, is hereto attached, marked "Exhibit C" and made part of this petition.

466 11. That demand for the payment of said sum has been made by the plaintiff on the defendants and the defendants have refused and still refuse to pay the same.

12. That the plaintiff has performed all of the conditions in said bond by it to be performed; that no part of said sum of Twenty-one Thousand and Fifty Dollars ($21,050.00) has been paid, and the whole of it is now due and owing, together with interest thereon from the 14th day of December, 1918, at the rate of 7% per annum.

Wherefore plaintiff prays that process issue, requiring the defendants to be and appear at the next term of this Honorable Court, to answer this complaint.

HERBERT J. HAAS,
Attorney for Petitioner.

467 Filed in office this the 20th day of Dec., 1918.

T. C. MILLER,
Deputy Clerk.

GEORGIA,
Fulton County:

Personally appeared Armand May, who on oath deposes and states that he is President of the American Mills Company, a corporation, plaintiff above named, and has authority to make this affidavit; that the facts and allegations set out in the foregoing petition are true.

ARMAND MAY.

Sworn to and subscribed to before me this 20th day of December, 1918.

LENARD HAAS,
Notary Public, Fulton County, Georgia.

468 Exhibit "A" annexed to this petition is the contract contained in paragraph 22 of the complaint in this action and printed on page 10 of this record.

Exhibit "B" annexed to this petition is the bond contained in paragraph 29 of the complaint in this action and printed on page 18 of this record.

468 *Process and Service in Georgia Suit.*

STATE OF GEORGIA,
County of Fulton:

AMERICAN MILLS CO.

vs.

HARTENFELD BAG COMPANY and AMERICAN SURETY CO. OF NEW YORK.

Complaint.

To the sheriff, or his deputy, of said county, Greeting:

The Defendants are hereby required personally or by attorney to be and appear at the Superior Court to be held in and for said county, on the first Monday in March, 1919, then and there to answer the Plaintiff's complaint, as in default thereof, said Court will proceed, as to justice shall appertain.

Witness, The Honorable J. T. Pendelton, Judge of said Court, this 20th day of Dec. 1918.

T. C. MILLER,
Deputy Clerk.

470 GEORGIA,
Fulton County:

Served the Defendant American Surety Company of New York a corporation, by serving H. N. Hutchinson, Manager of office, by leaving a copy of the within writ and process with him in person at the office and place of doing business of said Corporation in Fulton County, Ga.

This Dec. 21st, 1918.

W. G. McNAIR,
Deputy Sheriff.

GEORGIA,
Fulton County:

Diligent search made and the defendant Hartenfeld Bag Company not to be found in this county. This Dec. 23, 1918.

C. E. REGISTER,
D. Sheriff.

471 (*Demurrer of American Surety Company in Georgia Suit.*)

Fulton Superior Court, March Term, 1919.

No. 41657.

AMERICAN MILLS CO.

vs.

HARTENFELD BAG COMPANY and AMERICAN SURETY CO. OF NEW YORK.

Now comes the defendant, the American Surety Company of New York and demurs to the petition filed against it and for cause of demurrer says:

That said petition sets forth no cause of action against this defendant.

Wherefore, defendant prays that said petition be dismissed.

A. J. ORME,
Attorney for Defendant
The American Surety Company of New York.

Filed in office this the 19th day of March, 1919.

W. W. CLARKE,
Deputy Clerk.

472 *Answer in Suit in Superior Court of Fulton County, Georgia.*

Fulton Superior Court, March Term, 1919.

No. 41657.

AMERICAN MILLS COMPANY

vs.

HARTENFELD BAG COMPANY and AMERICAN SURETY COMPANY OF NEW YORK.

Suit on Bond.

Now comes the American Surety Company of New York, one of the defendants in the above stated case and without waiving its plea or demurrer heretofore filed makes this answer to the petition brought against it and for answer says:

1. Defendant admits paragraphs 1, 2, 3, 4, and 5 of said petition.

2. In answer to paragraph six (6) of said petition this defendant admits that the matter contained therein is set forth in said contract, but denies that the same set forth the intention of the parties to said contract.

3. Defendant cannot admit nor deny, for the want of sufficient information, paragraph seven (7) of said petition.

473 4. In answer to paragraph eight (8) defendant admits that the Hartenfeld Bag Company has failed and refused to return to the American Mills Company the amount set forth therein, but denies that it was ever the intention of either of the parties to the contract that such sum or any other sum should be returned to plaintiff in event of the failure to comply with the contract by the Hartenfeld Bag Company.

5. Defendant denies paragraph nine (9) of said petition.

6. Defendant admits paragraphs ten (10) and eleven (11) of said petition.

7. Defendant denies paragraph twelve (12) of said petition.

8. For further answer this defendant says at the time and prior to the execution of the contract between the American Mills Company and the Hartenfeld Bag Company, and the making of the bond by this defendant, as set forth in plaintiff's petition, the Hartenfeld Bag Company was indebted to the American Mills Company in the sum of Twenty-one Thousand and eighty-seven and 20/100 ($21,087.20) dollars, or other large sums. The American Mills Company becoming apprehensive as to its ability to collect said debt, Armand May, its President, went to Chicago the latter part of Sep-

tember, 1918, for the purpose of securing a settlement of sa
474 indebtedness, when he was informed by E. J. Hartenfeld, t
President of the Hartenfeld Bag Company that said de
could not be paid, nor secured, nor could any part thereof be pa
or secured, as the Hartenfeld Bag Company had no money or secur
ties with which to secure the same.

9. That the said Armand May, acting for the American Mil
Company and E. J. Hartenfeld, acting for the Hartenfeld Bag Com
pany, then entered into the contract set forth in plaintiff's petitio
and requested the American Surety Company of New York to exe
upon the bond upon, guaranteeing the performance of the contra
on the part of the Hartenfeld Bag Company.

10. Defendant shows said contract was not entered into in goo
faith by the parties thereto in that it was never intended that th
American Mills Company should pay to the Hartenfeld Bag Com
pany the Twenty-two Thousand One Hundred ($22,100.00) dollar
as set forth therein, or that any other sum should be paid to th
Hartenfeld Bag Company, but that Hartenfeld Bag Company wa
to deliver the bags called for in said contract to the American Mil
Company in payment of its past *past* due indebtedness.

11. Defendant says that the said Armand May having secure
said contract and bond returned to Atlanta and the said E. J.
475 Hartenfeld thought that the matter had been finally closed
but the said May realizing the necessity of paying to the
Hartenfeld Bag Company the Twenty-two Thousand One Hundred
($22,100.00) Dollars as called for in said contract in order to hol
this defendant under said bond issued the check of the American
Mills Company in favor of the Hartenfeld Bag Company for the
sum of Twenty-two Thousand One Hundred ($22,100.00) Dollar
which check was certified by the Third National Bank of Atlanta
Georgia.

12. That instead of remitting this check to the Hartenfeld Ba
Co., in the due course of mail as payment for the bags to be delivered
under said contract the said Armand May returned to Chicago taking
said check with him, where he called upon E. J. Hartenfeld, the
President of the Hartenfeld Bag Company advising him that he held
a certified check for the amount called for under said contract which
he would deliver to him upon securing in return a certified check
for the amount due the American Mills Company by the Hartenfeld Bag Company.

The said E. J. Hartenfeld then issued the check of the Hartenfeld
Bag Company in favor of the American Mills Company in the sum
of Twenty-one Thousand eighty-seven & 20/100 ($21,087.20)
Dollars, when both the said May and Hartenfeld went to the Forem
man Brothers Banking Company in Chicago and simultaneously
upon delivering to the Foreman Brothers Banking Com
476 pany the certified check of the American Mills Company
for deposit to the account of the Hartenfeld Bag Co., secured
the certification by the Foreman Brothers Banking Company of said
check in favor of the American Mills Company.

13. The check of the Hartenfeld Bag Company, in the sum of Twenty One Thousand eighty-seven & 20/100 ($21,087.20) Dollars, in favor of the American Mills Company drawn upon the Fireman Brothers Banking Company, would not have been paid or certified by said bank because of the lack of sufficient funds to the credit of the Hartenfeld Bag Co. unless the certified check of the American Mills Company as above set forth had been delivered to said bank for deposit to the account of said Hartenfeld Bag Company and this fact was well known to the said Armand May and was the cause of his returning to Chicago in that he did not intend to deliver the certified check of the American Mills Co. until he could in turn receive a certified check of the Hartenfeld Bag Company in payment of its past due debt to the American Mills Co.

14. Defendant shows that at the time of this transaction the said Armand May as President of the Plaintiff Company knew or had reason to believe the Hartenfeld Bag Company was insolvent and fearing the debt due the American Mills Company would be lost concocted the scheme as above set forth in entering upon said contract and securing the defendant as surety on said bond for that the Hartenfeld Bag Co. would faithfully perform under said contract, thus hoping either to secure payment in bags of its past due debt or the payment in cash from defendant in event the Hartenfeld Bag Company failed to make deliveries of bags within the time specified in said contract; all of which was done with a fraudulent intent to perpetrate a fraud upon this defendant.

15. Defendant shows that on the 12th day of December, 1924, a petition in involuntary bankruptcy was filed against the said Hartenfeld Bag Company, in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division and that thereafter on the 17th day of December, 1924, a Receiver was appointed by said court for the said Hartenfeld Bag Company and that on the 2nd day of January, 1925, it was duly adjudged a bankrupt by said court concerning thereto.

16. Defendant shows that in truth and in fact the American Mills Company has never paid to the Hartenfeld Bag Company Twenty-two Thousand One Hundred ($22,100.00) Dollars, as was called for under the contract for the purpose set forth therein, and no such payment was ever intended to be made but that the whole plan was merely a scheme and an attempt to deceive and to defraud this defendant and to exact from it payment under the bond issued upon the contract which was never intended by either of the parties should be performed thereunder by the American Mills Company.

17. Defendant avers that had it known the true facts and the intention of the parties under said contract it would never have entered as surety upon said bond and that at the time of assuming said suretyship it fully believed that according to the contract it was guaranteeing the delivery of certain bags by the Hartenfeld Bag Company to the American Mills Company which had been paid for in advance,

according to the terms of said contract; when as a matter of fact this defendant was entering upon a suretyship guaranteering the payment in bags of a past due indebtedness by the Hartenfeld Bag Company to the American Mills Company and which suretyship it did not and would not have assumed or undertaken.

18. Defendant further shows that the contract upon which it issued its bond as surety provided that said Twenty-two Thousand One Hundred ($22,100.00) Dollars had already been paid by the American Mills Company to the Hartenfeld Bag Company and the receipt of said amount was acknowledged under said contract by the Hartenfeld Bag Company and defendant entered upon said bond as it had a right to do with this understanding believing that
479 said sum had been actually paid, when as a matter of fact no such payment had ever been made, thereby perpetrating a fraud upon and actually deceiving this defendant and had this defendant known that payment had not been actually made it would not have entered upon said bond as surety.

Wherefore, defendant prays that said suit be dismissed with costs.

A. J. ORME,
Attys. for Defendant.

Filed in office this the 19th day of March, 1919.

W. W. CLARKE,
D. Clk.

480 *Amendment to Answer in Georgia Suit.*

Fulton Superior Court, March Term, 1919.

No. 41657.

AMERICAN MILLS COMPANY

vs.

HARTENFELD BAG COMPANY and AMERICAN SURETY COMPANY OF NEW YORK.

Suit on Bond.

The defendant American Surety Company of New York now comes at this the first term of the Court and moves the court to be allowed to amend its answer filed in the above entitled cause by adding thereto the necessary affidavit to verify the same, that is to say an affidavit in words, to wit:

STATE OF GEORGIA,
County of Fulton:

Before me in person appeared W. C. Leas, Assistant Manager of the American Surety Company of New York, who being duly sworn de-

poses and says that he is the Agent of the American Surety Company at its place of business located in the City of Atlanta and as such is authorized to make this affidavit and that the facts
481 stated in the foregoing answer are true.

W. G. LEAS.

Sworn to and subscribed before me, this 3rd, day of May, 1919.

B. H. SULLIVAN,
Notary Public, Fulton County, Ga.

S. R. ATKINSON & BORN,
A. J. ORME,
Attorneys for American Surety Company of New York.

Order.

Allowed and ordered filed subject to objection.
This May 3rd, 1919.

J. T. PENDELTON,
Judge Atlanta Circuit.

Filed in office this the 3rd day of May, 1919.

S. T. CONYERS,
Deputy Clerk.

Minutes 79, page 399.

482 (Plea in Bar in Georgia Suit.)

March Term, 1919.

No. 41657.

AMERICAN MILLS COMPANY

vs.

HARTENFELD BAG COMPANY and AMERICAN SURETY COMPANY OF NEW YORK.

Suit on Bond.

Now comes the defendant, the American Surety Company of New York, in the above stated case and files this its plea to the declaration filed against it in Fulton Superior Court and pleads as follows:

1. This defendant shows that the bond which it executed as surety and upon which this suit is founded provides in the second paragraph thereof as follows:

"That the principal shall be made a party to any suit or action and be served with process commencing the same if the principal can with reasonable diligence be found."

2. Defendant avers that on the 16th day of December, 1918, in the Circuit Court of Cook County, in Chicago, Illinois, the American

Mills Company, the plaintiff in the above stated case began a
483 suit against the Hartenfeld Bag Company and the American Surety Company of New York upon the contract and bond sued upon in this action, and that on the 17th day of December, 1918, the American Surety Company of New York was served at its office in Chicago, Illinois by delivering a copy of said complaint to J. L. Moehle, the Agent of said corporation by Charles W. Peters, Sheriff of Cook County and that on the 24th day of December, 1918, a copy of said summons of complaint was served upon the Hartenfeld Bag Company by delivering a copy of said complaint to J. M. Hartenfeld, Secretary of said company by Charles W. Peters, Sheriff of said Cook County, Illinois, which suit is now pending and a copy of said summons is hereto attached, marked Exhibit "A" and copy of the declaration is hereto attached, marked Exhibit "B", both of which are made a part hereof and to which reference is prayed as often as may be necessary.

3. The defendant shows that at the time of the service of said summons of complaint in Cook County, Illinois it was maintaining an office for the transaction of business in said State and County.

4. That the Hartenfeld Bag Company, is a corporation organized under the laws of the State of Illinois and on the 24th day of December, 1918, the date of the service of said summons upon it,
484 had its principal place of business in Chicago, Cook County, Illinois.

5. This defendant shows that subsequent to said summons filed in said Circuit Court of Cook County, Illinois, the American Mills Company filed its declaration asking judgment against this defendant and the Hartenfeld Bag Company under the same contract and bond upon which this suit is founded and for a like amount.

6. Defendant shows that this action was not filed in this court until the 20th day of December, 1918, after said suit had been begun in the Circuit Court of Cook County, Illinois.

7. This defendant shows that the Hartenfeld Bag Company has no office or place of business in the State of Georgia; that they have not and cannot be served as defendant in this case.

8. This defendant shows that said bond was executed in the State of Illinois covering an assumed contract entered into in the State of Illinois and to be performed in that State.

9. This defendant shows that in pursuance to the terms of said bond as set forth in paragraph one (1) herein the Circuit Court of Cook County, Illinois had prior to the time of the filing of this suit assume- jurisdiction of suit filed in that court in which both the principal and surety on said bond were served with said pro-
485 ceedings and in that court the matters and issue to be determined may be disposed of, while under the suit filed in Fulton Superior Court no jurisdiction can be obtained against the principal on said bond.

10. Defendant shows that the action pending in the Circuit Court of Cook County, Illnois is a bar to this action.

Wherefore, this defendant prays that this action be dismissed at the cost of plaintiff.

ATKINSON AND BORN &
A. J. ORME,
Attys. for Deft.

486 *Summons in Chicago Suit.*

Copy.

Summons in Debt—Circuit Court—B-48488.

STATE OF ILLINOIS,
Cook County, ss:

The People of the State of Illinois to the Sheriff of said County, Greeting:

We Command you that you summon Hartenfeld Bag Company, a corporation, and American Surety Company of New York, a corporation if they shall be found in your county, personally to be and appear before the Circuit Court of Cook County, on the first day of the next term thereof, to be holden at the Court House, in Chicago, in said Cook County, on the Third Monday of February A. D. 1919, to answer American Mills Company, a corporation of a plea that they render to the said plaintiff, Twenty-two Thousand ($22,000.00) Dollars and — cents which they owe to and unjustly detain from it to the damage of the said Plaintiff as is said in the sum of Twenty-two Thousand ($22,000) Dollars.

And have you then and there this Writ, with an endorsement thereon in what manner you shall have executed same.

487 Witness, August W. Miller, Clerk of said Court, and the Seal thereof, at Chicago, in said County, this 16th day of December, A. D. 1918.

[SEAL.] (Signed) AUGUST W. MILLER,
Clerk.

(Endorsement on Back.)

Circuit Court of Cook County, February Term, A. D. 1919.

G. D. No. 44888.

AMERICAN MILLS COMPANY, a Corporation,

vs.

HARTENFELD BAG COMPANY, a Corporation, and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation.

Summons in Debt.

Messrs. Rosenthal & Kennedy and Herbert J. Haas, Plff.'s Attys.

Served this writ on the within named American Surety Company of New York, a corporation, by delivering a copy thereof to J. L.

Mochle, Attorney and Agent of said Corporation this 17th day of December, 1918, The President of said corporation not found in my County.

CHARLES W. PETERS,
Sheriff,

By JOSEPH PIONKE, Jr.,
Deputy.

488 Served this writ on the within named Hartenfeld Bag Company a corporation by delivering a copy thereof to J. M. Hartenfeld, Secretary of said corporation this 24th day of December, 1918. The President of said corporation not found in my county.

CHARLES W. PETERS,
Sheriff,

By LONG, *Deputy.*

489 *Declaration in Chicago Suit.*

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

Gen. No. B 48488.

AMERICAN MILLS COMPANY, a Corporation, Plaintiff,

vs.

HARTENFELD BAG COMPANY, a Corporation, and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Defendants.

Declaration.

American Mills Company, a corporation, etc., by Moses, Rosenthal & Kennedy and Herbert J. Hass, its attorneys, complains of Hartenfeld Bag Company, a corporation, etc., and American Surety
490 Company, of New York, a corporation, etc., of a plea that they render unto the plaintiff the sum of Twenty-Two Thousand Dollars ($22,000.00) which they, the said defendants, owe to, and unjustly detain from said American Mills Company, the plaintiff herein;

For That, Whereas, on, to-wit, the 27th day of September, 1918, the said Hartenfeld Bag Company, one of the defendants herein, as party of the second part, entered into a contract or agreement with the said American Mills Company, under the name, style and description of the American Mills Company, plaintiff herein, as party of the first part, in words and figures as follows, to-wit:

Hartenfeld Bag Co., Inc.

Telephone, Haymarket 6513.

Hartenfeld Bag Company,

312-316 North Carpenter St.,

Chicago.

Bags and Burlap.

Number —.
Chicago Association of Commerce.

491 Contract Entered Into — and Between American Mills Company, Corporation, Atlanta, Ga., Party of the First Part, and the Hartenfeld Bag Company, Corporation, Chicago, Ill., Party of the Second Part.

American Mills Company agree to purchase and the Hartenfeld Bag Company, agree to sell the following bags at specified prices, subject to specified conditions as therein contained.

25,000 strictly No. 1 Inside Coffee bags @ 30c. each.
50,000 strictly No. 1 Gold Medal bags @ 16c. each.
30,000 lbs. guaranteed strictly No. 1 sewed burlap 40 inch 8 ounce @ 22c. lb.
F. O. B. Chicago.

Total amount of this contract is twenty-two thousand one hundred dollars, ($22,100.00) paid to Hartenfeld Bag Company upon the execution of this agreement, the receipt whereof is hereby acknowledged.

In the event that the said Hartenfeld Bag Company shall not make delivery of the said (merchandise) bags on or before seventy-five days after the date hereof then said Hartenfeld Bag Company shall retain of said twenty-two thousand one hundred dollars ($22,100.00) only so much thereof as will pay at the contract rate for such bags as has been delivered and accepted by American Mills Company, and said Hartenfeld Bag Company shall at the expiration of
492 seventy-five days immediately return to American Mills Company the difference between said twenty-two thousand one hundred dollars ($22,100.00) and the price of the bags delivered.

The Hartenfeld Bag Company further agree to furnish to the American Mills Company a Surety Bond properly executed by an approved company of such standing as will be acceptable to American Mills Company, which bond is to serve as a guaranty of the

faithful performance of the terms of this contract by the Hartenfeld Bag Company. This bond is to be in the penal sum of $22,000.00.

(Signature) AMERICAN MILLS COMPANY.
A. MAY,
Pres.

" HARTENFELD BAG COMPANY.
E. J. HARTENFELD,
Pres.

September 27th, 1918.

That thereupon, pursuant to the terms of said contract or agreement, said plaintiff heren paid to the said Hartenfeld Bag Company, one of the said defendants herein, and the said Hartenfeld Bag Company received of and from the said plaintiff the said sum of Twenty-two thousand one hundred dollars ($22,100.00) as and for the purchase price of the property in said contract or agreement set forth; that in and by the said contract or agreement the
493 said Hartenfeld Bag Company undertook, promised and agreed to sell, and did sell to the said plaintiff herein, and the said plaintiff herein agreed to purchase, and did purchase of and from the said Hartenfeld Bag Company, for the said sum of Twenty-two thousand one hundred dollars, ($22,100.00), paid as aforesaid pursuant to said contract or agreement, the merchandise in said agreement set forth, and the said Hartenfeld Bag Company thereby undertook, promised and agreed that in the event the said Hartenfeld Bag Company should not make delivery of said to-wit: merchandise on or before seventy-five (75) days after the date of said contract or agreement, namely, on or before, to-wit, the 11th day of December, 1918, then the said Hartenfeld Bag Company would at the expiration of said seventy-five (75) days immediately return to the plaintiff herein the difference between the said Twenty-two thousand one hundred dollars ($22,100.00) paid as aforesaid, and the price of the bags which should have been delivered pursuant to the said contract or agreement prior to the expiration of said seventy-five (75) days; and plaintiff avers that pursuant to the provisions of said contract or agreement, bearing date September 27th, 1918, between the said American Mills Company, as party of the first part, and the said Hartenfeld Bag Company, as party of the second part, above mentioned, the said Hartenfeld Bag Company as principal, and
494 the said American Surety Company of New York, as surety, signed and sealed and delivered to the said American Mills Company, plaintiff herein, on, to-wit, the 28th day of September, 1918, and the said American Mills Company, plaintiff herein, accepted a certain bond, to serve as a guaranty of the performance by the said Hartenfeld Bag Company, defendant herein, of the terms of said contract or agreement of September 27th, 1918, aforesaid, that said bond was and is dated, to-wit, September 28, 1918, and is in words and figures as folows, to-wit:

"American Surety Company of New York.

Capital, $5,000,000.

Company's Office Building, 100 Broadway, New York.

Standard Form of Contract Bond.

Know all men by these presents, That we, Hartenfeld Bag Company of Chicago, Illinois, (hereinafter called the Principal), as principal, and the American Surety Company of New York (hereinafter called the Surety), as surety, are held and firmly bound unto American Mills Company of Atlanta, Georgia (hereinafter called the obligee), in the sum of Twenty-two Thousand ($22,000.00)
495 Dollars ($—), for the payment whereof said Principal and Surety bind themselves firmly by these presents.

Whereas, The principal has entered into a written contract dated September 27th, 1918, with the Obligee, for furnishing 75,000 bags (Coffee & Gold Medal) and 30,000 lbs. guaranteed sewed burlap a copy of which is hereto annexed:

Now, therefore, The condition of this obligation is such, that if the Principal shall indemnify the Obligee against any loss or damage directly arising by reason of the failure of the Principal to faithfully perform said contract, then this obligation shall be void; otherwise to remain in full force and effect.

Provided, however, and upon the express conditions, the performance of each of which shall be a condition precedent to any right of recovery hereon:

First. That in the event of any default on the part of the Principal, a written statement of the particular facts showing such default and the date thereof shall be delivered to the Surety, by registered mail, at its office in the City of Chicago, Illinois, promptly and in any event within ten (10) days after the Obligee or his representative, or the Architect, if any, shall learn of such default; that the Surety shall have the right within thirty (30) days after
496 the receipt of such statement to proceed, or procure others to proceed, with the performance of such contract; shall also be subrogated to all of the rights of the principal; and any and all moneys or property that may at the time of such default be due, or that thereafter may become due to the Principal under said contract, shall be credited upon any claim which the Obligee may then or thereafter have against the Surety, and the surplus, if any, applied as the Surety may direct.

Second. That no claim, suit of action by reason of any default shall be brought against the Principal or Surety after the 24th day of December, 1918, nor shall recovery be had for damages accruing after that date; that service of writ or process commencing any such suit or action shall be made on or before such date; that the principal shall be made a party to any suit or action, and be served with process commencing the same if the Principal can with reasonable

diligence be found; that no judgment shall be rendered against the Surety in excess of the penalty of this instrument.

Third. That the Surety shall not be liable for any damages resulting from strikes or labor difficulties, or from mobs, riots, fire, the elements, or acts of God, or for the repair or reconstruction of any work or materials damaged or destroyed by any such causes;
497 nor for damages from injury to person, or for the death of anyone; nor under or by virtue of any statutory provision for damages or compensation for injury to or for the death of any employe; nor for the non-performance of any guaranties of the efficiency or wearing qualities of any work done or material furnished or the maintenance thereof or repairs thereto; nor for the furnishing of any bond or obligation other than this instrument nor for damages caused by delay in finishing such contract in excess of ten per centum of the penalty of this instrument.

Fourth. That the Obligee shall faithfully perform all the terms, covenants and conditions of such contract on the part of the Obligee to be performed; and shall also retain that proportion, if any, which such contract specifies the Obligee shall or may retain of the value of all work performed or materials furnished in the prosecution of such contract (not less, however, in any event, than ten per cetnum of such value), until the complete performance by the Principal of all the terms, covenants and conditions of said contract on the Principal's part to be performed; that the plans and specifications mentioned in said contract are not in any respect defective, and are and at all times will be kept adequate for the complete performance of such contract, and that no change shall be made in such plans
498 and specifications which shall increase the amount to be paid the Principal more than the ten per centum of the penalty of this instrument, without the written consent of the Surety.

Fifth. That no right of action shall accrue upon or by reason hereof, to or for the use or benefit of any one other than the Obligee herein named; and that the obligation of the Surety is, and shall be construed strictly as, one of suretyship only, shall be executed by the Principal before delivery, and shall not, nor shall any interest therein or right of action thereon, be assigned without the prior consent, in writing, of the Surety.

Signed and sealed, this 28th day of September, 1918.

[Corporate Seal of Hartenfeld Bag Co.]

HARTENFELD BAG COMPANY,
By E. H. HARTENFELD, *Pres.*

[Corporate Seal of American Surety Co. of New York.]

AMERICAN SURETY COMPANY OF NEW YORK,
By JAY J. REYNOLDS,
Resident Vice Pres.

Attest:
A. C. KOLB,
Resident Assistant Secretary.

499 STATE OF ILLINOIS,
County of Cook, ss:

I, C. M. Schuh, a Notary Public of Cook County, in the State of Illinois, do hereby certify that Jay J. Reynolds Resident Vice President and A. C. Kolb Resident Assistant Secretary of American Surety Company of New York, personally known to me to be the same persons whose names are subscribed to the foregoing instrument and personally known to me to be the Resident Vice-President and Resident Assistant Secretary, respectively, of said American Surety Company of New York, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act as such Resident Vice-President and Resident Assistant Secretary respectively, and as the free and voluntary act of said American Surety Company of New York, for the uses and purposes therein set forth.

Given under my hand and notarial seal at my office in the City of Chicago, on this 28th day of September, A. D. 1918.

C. M. SCHUH,
Notary Public.

500 *Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.*

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 15, 1918, at twelve o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees American Surety Company of New York.

"GENTLEMEN:

"The Committee appointed by the Executive Committee of this Company, at their meeting held Tuesday, December 11, 1917, for the

purpose of nominating Officers of the Company for the ensuing year and until their successors are elected, beg leave to report as follows:

501 "We nominate for

Place.	Resident vice-presidents.
Chicago, Ill.	John J. Mitchell, Ernest A. Hamill, Orson Smith, M. L. Jenks, J. L. Moehle, George S. Haskill, Ben H. Davenport, Jay J. Reynolds, George W. Blossom, William E. Bigbee, Herbert Darlington, A. G. Stanten, W. W. Steiner, Joseph W. Cook,

	Resident assistant secretaries.
	Frederic F. Norcross, J. L. Moehle, W. W. Steiner, M. L. Jenks, H. L. Olsen, Ray J. Reynolds, B. H. Davenport, W. R. O'Donnell, Frank J. Hartray, Joseph W. Cook, A. G. Stanten, W. E. Furzland, A. C. Kolb.

* * * * * * *

"Whereupon, it was

502 "Resolved, That the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected

"The following resolution was adopted:

"Resolved, That the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute

and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by a Resident Assistant Secretary."

* * * * * * *

503 STATE OF NEW YORK,
County of New York, ss:

I, W. H. Bennem, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company at the City of New York, this 16th day of January, 1918.

W. H. BENNEM,
Assistant Secretary.

That in and by the said bond the said Hartenfeld Bag Company, as principal, and the said American Surety Company of New York, as surety, declared, and declare themselves held and firmly bound unto the American Mills Company, the plaintiff herein, in
504 the sum of Twenty-two thousand dollars ($22,000.00); and therein provided that the condition of said obligation evidenced by the said bond was such that if the said Hartenfeld Bag Company should indemnify the plaintiff herein, the American Mills Company, against any loss or damage directly arising by reason of the failure of the said Hartenfeld Bag Company to faithfully perform the said contract or memorandum of agreement before-mentioned, bearing date of 27th day of September, 1918, that the said obligation evidenced by the said bond should be void; otherwise it should remain in full force and effect; that in and by said bond it was provided, among other things, that in the event of any default on the part of the said Hartenfeld Bag Company, the principal therein, a written statement of the particular facts showing such default, and the date thereof, should be delivered to the said American Surety Company of New York, as surety, by registered mail, at its office in the City of Chicago, Illinois, promptly, and in any event within ten (10) days after the American Mills Company, or its representative, or the Architect, if any, should learn of such default, and of a breach of said writing obligatory, to-wit, said bond. The said plaintiff avers that after the signing, sealing and delivery of the aforesaid contract or agreement and bond as aforesaid, the said

Hartenfeld Bag Company delivered under the said contract or agreement bearing date, to-wit, September 27th, 1918, and between
505 that date, and to and including, to-wit, December 11, 1918, only, to-wit, thirty-five hundred (3,500) strictly Number One (1) inside Coffee Bags, aggregating, at the prices mentioned in said contract or agreement, to-wit, Ten hundred and fifty dollars ($1,050.00); that the said Hartenfeld Bag Company did not, nor did anyone in its behalf, deliver any other bags or any other merchandise mentioned in the said contract or agreement bearing date, to-wit, September 27th, 1918, since said date and prior to the commencement of this suit; that upon the expiration of the said seventy-five (75) days, to-wit, December 11, 1918, the said Hartenfeld Bag Company did not, nor did anyone in its behalf, nor did the said American Surety Company of New York, a corporation, or anyone on its behalf, immediately return to the said American Mills Company, the plaintiff herein, the difference between the said Twenty-two thousand one hundred dollars, ($22,100.00) paid by the said plaintiff to the said Hartenfeld Bag Company under said contract or agreement bearing date, to-wit, September 27th, 1918, and the price of the bags delivered under said contract or agreement as aforesaid; that on, to-wit, December 14, 1918, the said plaintiff through its authorized representative, by registered mail, notified the said defendant, the American Surety Company of New York, of the said default of the said Hartenfeld Bag Company under said contract or agreement and load, and demanded payment of the said sum of Twenty-one thousand and fifty dollars ($21,050.00).

506 By reason whereof, the said writing obligatory, to-wit, said bond, became and is forfeited, and thereby an action has accrued to the plaintiff to demand and have of and from the defendants, said Hartenfeld Bag Company, and said American Surety Company of New York, the said sum of Twenty-one thousand and fifty dollars ($21,050.00) above demanded, yet the said defendants, although often thereto requested, have not paid the said sum of money above demanded, or any part thereof, but the said defendants have hitherto wholly neglected and refused and still do neglect and refuse so to do, to the damage of the plaintiff in the sum of Twenty-two thousand dollars ($22,000.00).

Wherefore, it brings its said action of debt, etc.

MOSES, ROSENTHAL & KENNEDY,
HERBERT J. HAAS,
Attorneys for Plaintiff.

507 *Affidavit of Amount Due.*

STATE OF ILLINOIS,
County of Cook, ss:

Hamilton Moses, being duly sworn, says, that he is the duly authorized agent of the plaintiff in this behalf; that the demand of the plaintiff in the above entitled cause is for money due and owing

that there is due to the plaintiff from the defendants, after allowing to defendants all just credits, deductions and setoffs, upon said instrument bearing date September 28, 1908, in said declaration set forth, the sum of Twenty-one thousand and fifty dollars ($21,050.00).

H. WADE ROSS, Master.

Subscribed and sworn to before me this 7th day of May, A. D. 1909.

H. V. McCARTY,
Notary Public, Cook County, Illinois.

Filed in office this the 10th day of March, 1909.
W. W. CLARKE,
Deputy Clerk.

308 *Notice of Default.*

Chicago, Illinois, December 14, 1908.

The American Surety Company of New York,
Room 1206, Continental and Commercial Bank Building,
208 So. La Salle Street,
Chicago, Illinois.

GENTLEMEN:

Notice is hereby given you of the default upon the part of the Harrodsfeld Rug Company, of Chicago, Illinois, under that certain written contract dated September 27, 1908, between the American Mills Company, of Atlanta, Georgia, party of the first part, and the Harrodsfeld Rug Company, of Chicago, Illinois, party of the second part, for the sale and delivery by the latter to the former of Seventy-five thousand (75,000) bags of Coffee and Cold Medal, and Thirty thousand (30,000) pounds guaranteed actual burlap (all more fully described in said contract), and for the return immediately at the expiration of seventy-five (75) days by the Harrodsfeld Rug Company to the American Mills Company in the event of the failure of the Harrodsfeld Rug Company to make delivery of said merchandise on or before seventy-five (75) days after the date of said contract of the difference between the sum of Twenty-one thousand one hundred dollars ($22,100.00), the total amount of said contract,
309 and the price of the bags delivered under said contract, and also the default under the conditions of that certain bond executed and delivered under date of September 28, 1908, by the said Harrodsfeld Rug Company, as principal, and you, the American Surety Company of New York, as surety, to the undersigned, the American Mills Company.

Said default consists of the failure upon the part of the said Harrodsfeld Rug Company at the expiration of said seventy-five (75) days immediately to return to the said American Mills Company the difference between the Twenty-one thousand one hundred dollars

($22,100.00), (being the contract price) and the price of the bags delivered; the said Hartenfeld Bag Company having failed to deliver the merchandise on or before Seventy-five (75) days after the date of said contract.

The Hartenfeld Bag Company claims to have delivered f. o. b. Chicago to the American Mills Company, under said contract, Thirty-five hundred (3,500) Strictly number one inside coffee bags. Those Thirty-five hundred (3,500) bags have never been received by the said American Mills Company. In the event that these bags so shipped upon their receipt are found to conform with the bags referred to in said contract, the same will be credited on the contract. In that event, the default under the contract and bond is the failure immediately at the expiration of said Seventy-five (75) days to return to the American Mills Company the sum of Twenty-one
510 thousand and fifty dollars ($21,050.00), which is the difference between the amount of the contract price, to-wit: Twenty-two thousand one hundred dollars ($22,100.00), and the price of the bags delivered, to-wit: Ten hundred and fifty dollars ($1,050.00). In the event that the Thirty-five hundred (3,500) bags do not conform with the bags described in the contract, the default under said contract and bond consists of the failure immediately at the expiration of said Seventy-five (75) days to return to the American Mills Company the said purchase price of Twenty-two thousand one hundred dollars ($22,100.00).

This notice is given to you pursuant to the provisions of the bond given by the Hartenfeld Bag Company, as principal, and yourself, as surety to the American Mills Company, above referred to.

You will kindly govern yourself accordingly.

Respectfully,

AMERICAN MILLS COMPANY,
By HERBERT J. HAAS,
Its Duly Authorized Agent and Representative in This Behalf.

(By Registered Mail.)

511 (*Amendment to Plea in Georgia Suit.*)

Fulton Superior Court, March Term, 1919.

No. 41657.

AMERICAN MILLS COMPANY

vs.

HARTENFELD BAG COMPANY and AMERICAN SURETY COMPANY OF NEW YORK.

Suit on Bond.

The Defendant American Surety Company of New York now comes at this the first term of the Court and moves the Court to be allowed to amend its special plea in said cause filed on the — day

of March, 1919, by adding thereto the necessary affidavit to verify the same; that is to say the following affidavit.

STATE OF GEORGIA,
County of Fulton:

Before me in person appeared W. G. Leas, Assistant Manager, of the American Surety Company of New York, who being duly sworn, deposes and says that he is the Agent of the American Surety Company at its place of business located in the City of Atlanta and as such is authorized to make this affidavit and that the facts stated in the foregoing plea are true.

W. G. LEAS.

512 Sworn to and subscribed before me this 3rd day of May, 1919.

B. H. SULLIVAN,
Notary Public, Fulton County, Ga.

S. R. ATKINSON AND
—— BORN,
A. J. ORME,
Attorneys for American Surety Company of New York.

Allowed, order filed subject to objection.
This 3rd day of May, 1919.

J. T. PENDLETON,
Judge Atlanta Circuit.

Filed in office this the 3rd day of May, 1919.
S. T. CONYERS,
D. Clk.

513 (*Motion to Strike Plea in Bar in Georgia Suit.*)

STATE OF GEORGIA,
County of Fulton:

Fulton Superior Court, March Term, 1919.

No. 41657.

AMERICAN MILLS COMPANY

vs.

HARTENFELD BAG COMPANY and AMERICAN SURETY CO. OF NEW YORK.

To the Superior Court of said county:

And now comes the plaintiff, American Mills Company, and moves the Court to strike the plea in bar filed by the defendant, American Surety Company of New York, for the following reasons:

1. That said plea in bar is insufficient in law.

2. That said plea in bar sets up no facts which are a legal bar to plaintiff's suit.

3. Plaintiff prays an order to show cause why said plea in bar should not be stricken.

ROSSER, SLATON, PHILLIPS AND HOPKINS,
HERBERT J. HAAS,
Plaintiff's Attorneys.

514 Read and considered. Let the defendant show cause before me on Saturday, April 19, 1919, at 9:30 o'clock A. M. why plaintiff's motion should not be granted. Let the defendant be served with a copy of this petition and order.

GEO. L. BELL,
Judge S. C. A. C.

(*Order Overruling Motion.*)

In Open Court, Sept. Term, 1919.

The above stated motion having been heretofore submitted, upon argument of counsel for the respective parties, it is now, upon further consideration, ordered and adjudged that the same be and it is hereby overruled.

Oct. 3rd, 1919.

J. T. PENDLETON,
Judge S. C. A. C.

515 (*Exceptions Pendente Lite in Georgia Suit.*)

STATE OF GEORGIA,
County of Fulton:

Fulton Superior Court, March Term, 1919.

No. 41657.

AMERICAN MILLS COMPANY

vs.

HARTENFELD BAG COMPANY and AMERICAN SURETY COMPANY OF NEW YORK.

Suit on Bond.

Be it remembered, That on the 20th day of December, 1918, the American Mills Company, plaintiff in the above stated suit, brought suit against Hartenfeld Bag Company, Principal, and American Surety Company of New York, Surety, in the Superior Court of

Fulton County, Georgia, upon a certain writing or bond of indemnity, executed by the Hartenfeld Bag Company, as principal, and American Surety Company of New York, as Surety, to the American Mills Company, on the 28th day of September, 1918, wherein it is provided as one of the terms and conditions of said indemnity as follows:

"That no claim, suit or action by reason of any default shall be brought against the Principal or Surety after the 24th day
516 of December, 1918; nor shall recovery be had for damages accruing after that date; that service of writ or process commencing any such suit or action shall be made on or before such date; that the Principal shall be made a party to any such suit or action, and be served with process commencing the same if the Principal can with reasonable diligence be found; that no judgment shall be rendered against the Surety in excess of the penalty of this instrument."

The said suit aforesaid was brought by the American Mills Company against the Hartenfeld Bag Company principal and American Surety Company of New York, as Surety, and process was issued in said suit on the 20th day of December, 1918, against the Hartenfeld Bag Company and the American Surety Company of New York. Due and legal service of said process was made on American Surety Company of New York, on December 21, 1918, and December 23rd, 1918, a Deputy Sheriff of the County of Fulton made, as to Hartenfeld Bag Company, on said process, the following entry:

"Georgia, Fulton County: Diligent search made and the defendant Hartenfeld Bag Company not to be found in this County.
This Dec. 23rd, 1918."

On the 19th day of March, 1919, the defendant, American Surety Company of New York, filed its plea in bar to said suit,
517 wherein it quotes the following provision of the bond sued upon:

"That the principal shall be made a party to any suit or action and be served with process commencing the same if the principal can with reasonable diligence be found."

And alleged in said plea in bar that on the 16th day of December, 1918, in the Circuit Court of Cook County, Illinois, the American Mills Company instituted suit against the Hartenfeld Bag Company, Principal, and the American Surety Company of New York, Surety, upon the same contract and bond sued upon, which was duly served both upon the Hartenfeld Bag Company, and the American Surety Company of New York. That the present action was not filed in this Court until the 20th day of December, 1918, after the commencement of the above stated suit in Cook County, Illinois. That the Hartenfeld Bag Company had no place of business in the State of Georgia; and cannot be served as a defendant in this case. That the bond sued upon was executed and the contract sued on

was entered into in the State of Illinois, to be performed in that State. That the Circuit Court of Cook County, Illinois, had assumed jurisdiction as against both the principal and surety in the bond sued upon; and that said suit in Cook County, Illinois, is a bar to said action in Fulton Superior Court.

518 The defendant prayed in said plea that the present action be dismissed at the cost of the plaintiff.

On the 19th day of April, 1919, American Mills Company, moved to strike the plea above referred to filed by defendant, American Surety Company of New York, for the following reasons:

"1. That said plea in bar is insufficient in law.

2. That said plea in bar sets up no facts which are a legal bar to plaintiff's suit.

3. Plaintiff prays an order to show cause why said plea in bar should not be stricken."

In May, 1919, a hearing was had before his Honor, Judge John T. Pendleton, one of the Judges of the Superior Court of Fulton County, upon the motion of the plaintiff to strike said plea above stated for the reasons above stated. After hearing argument thereon, the Court on October 3, 1919, passed the following order:

"In Open Court, Sept. Term, 1919.

"The above stated motion having been heretofore submitted, upon argument of counsel for the respective parties, it is now, upon further consideration, ordered and adjudged that the same be and it is hereby overruled."

519 To which said order and judgment of the Court overruling said motion to strike, the plaintiff, the American Mills Company, then and there excepted, and now excepts, and alleges that the same was error, and says that the Court should have sustained said motion to strike said plea, because:

1. Said plea sets up no legal defense to the action brought by the American Mills Company.

2. Because the jurisdiction of Fulton Superior Court is fixed by the laws of this State:

3. Because the parties hereto cannot by any agreement prior to the bringing of said suit, deprive this Court of any jurisdiction given it by the laws of this State. Under the laws of this State, this suit can be maintained in this State; and the agreement set out in the bond sued upon cannot deprive this Court of its jurisdiction; and this Court can maintain and hear said cause in spite of said agreement.

4. Because the provision in the bond sued upon, to-wit: "That the principal shall be made a party to any suit or action and served

with process commencing the same if the principal can with reasonable diligence be found" is in the present suit substan-
520 tially complied with. The Hartenfeld Bag Company was made a party to said suit, and the service of said suit on the Bag Company was executed, in accordance with the terms of the bond, because after diligent search it could not be found within the jurisdiction of this Court.

5. Because it is immaterial to the present suit, that suit on the same cause of action had been brought in the State of Illinois. That suit would not in any sense be a bar to the present suit.

6. Because under the laws of this State, the Court has jurisdiction of this cause, and no fact is set up in the plea that could act as in bar or abatement to the present suit.

7. Because under the law, the Court should have stricken said plea, because there was therein no fact set up which could in part or in whole be a defense to this suit, and the said plea could not in law be sued in whole or in part as in bar or abatement to this suit.

Wherefore, at the same term of the Court at which said order was granted, and within thirty days from the date thereof, the plaintiff, the said American Mills Company, files this its exceptions pendente lite, and alleges error upon said action of the
521 Court, and shows that the declaration, the plea in bar or abatement, the motion to strike the same, and the judgment of the Court on said motion to strike, are essential to a clear understanding of the errors alleged to have been committed.

Wherefore, the plaintiff, American Mills Company, prays that its exceptions pendente lite be allowed as provided by law, and ordered made a part of the record.

HERBERT HAAS,
ROSSER, SLATON, PHILLIPS AND HOPKINS,
Attorneys for Plaintiff.

Order.

The above exceptions certified to be true, and ordered placed on the record.
This Oct. 22, 1919.

J. T. PENDLETON,
Judge.

Filed in office this the 22nd day of October, 1919.
T. C. MILLER,
Deputy Clerk.

(Minutes 79, page 704.)

522 DEFENDANT'S EXHIBIT "B."

This exhibit is the declaration in the action in Cook County, Illinois, and is incorporated in Defendant's Exhibit A and printed on page 489 of this record.

523 DEFENDANT'S EXHIBIT C.

Answer in Cook County Suit.

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

General No. B-48488.

AMERICAN MILLS COMPANY, a Corporation, Plaintiff,

vs.

HARTENFELD BAG COMPANY, a Corporation, and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Defendants.

1.

And the defendant, American Surety Company of New York, by F. F. & J. V. Norcross, its attorneys, comes and defends the wrong and injury when etc., and says that the supposed writing obligatory in said declaration mentioned is not its deed, and of this
524 it puts itself upon the country.

2.

And for a further plea in this behalf the defendant says that the plaintiff ought not to have its aforesaid action against it, the defendant, because it says that the plaintiff has not at any time since the making of the said supposed writing obligatory and condition thereof, as set forth in the plaintiff's declaration, hitherto been in anywise damnified by reason of any matter or thing in said condition mentioned, and this the defendant is ready to verify,—wherefore it prays judgment if the plaintiff ought to have its aforesaid action, etc.

3.

And for a further plea in this behalf this defendant says that it ought not to be charged with the said debt by virtue of the said supposed indemnifying bond set forth in said plaintiff's declaration because it says that it, the defendant executed said instrument as surety for said Hartenfeld Bag Company, and not otherwise, and that the plaintiff did not faithfully perform all of the terms, covenants and conditions of the said contract referred to in said in-

demnifying bond on its part to be performed as alleged in its declaration, but so to do utterly failed in this, to-wit, that it, the
525 plaintiff, did not upon the execution of said contract pay unto the Hartenfeld Bag Company the sum of Twenty-two Thousand One Hundred ($22,100.00) Dollars for the purchase of the merchandise therein described to be thereafter delivered to it, but instead thereof, without notifying or securing the consent of this defendant, agreed with the said Hartenfeld Bag Company that a previous existing indebtedness due unto the plaintiff from the Hartenfeld Bag Company should stand in lieu of said cash payment as consideration for the delivery to the plaintiff of said merchandise referred to in the said contract; by reason whereof this defendant was discharged and released from all liability as surety upon said bond of indemnity and this the defendant is ready to verify:—wherefore it prays judgment if the plaintiff ought to have its aforesaid action, etc.

4.

And for a further plea in this behalf this defendant says that it ought not to be charged with the said debt by virtue of the said supposed indemnifying bond set forth in said plaintiff's declaration because it says that it, the defendant, executed said supposed bond as surety only and not otherwise, and in so doing it relied upon the recitals contained in the contract referred to in said bond to the effect that the plaintiff, upon the execution of said contract, had paid unto the principal, Hartenfeld Bag Company, the sum of Twenty-two Thousand One Hundred ($22,100.00) Dollars
526 as the purchase price of the merchandise therein mentioned and that the said Hartenfeld Bag Company had acknowledged the receipt of said payment. Whereas in truth and in fact the said plaintiff did not, upon the execution of said contract, pay unto the Hartenfeld Bag Company the said sum of Twenty-two Thousand and One Hundred ($22,100.00) Dollars, or any other sum of money, but instead thereof agreed with said Hartenfeld Bag Company to accept said merchandise mentioned in said contract and indemnifying bond in payment and discharge of an existing indebtedness then due to the plaintiff from the Hartenfeld Bag Company; that the real consideration for the agreement on the part of the Hartenfeld Bag Company to deliver said merchandise to the plaintiff was totally changed and different from the consideration mentioned in said contract; that this defendant had no knowledge of said changed and different consideration, and did not consent thereto; by reason whereof this defendant was discharged and released from all liability as surety upon said supposed indemnifying bond, and this the defendant is ready to verify;—wherefore it prays judgment if the plaintiff ought to have its aforesaid action, etc.

5.

And for a further plea in this behalf this defendant says that it ought not to be charged with the said debt by virtue of the said sup-

posed indemnifying bond set forth in said plaintiff's decla-
527 ration because it says that it executed said supposed bond as surety only and not otherwise, and that the execution by this defendant of said indemnifying bond in said declaration mentioned was obtained by said plaintiff and said Hartenfeld Bag Company through fraud, covin and misrepresentation, that is to say, by the said plaintiff and the said Hartenfeld Bag Company falsely and fraudulently representing to this defendant that said contract was for the purchase by said plaintiff of certain merchandise mentioned in said contract upon the payment in cash by the plaintiff to the Hartenfeld Bag Company, principal on said supposed indemnifying bond, of the sum of Twenty-two Thousand One Hundred ($22,100.00) Dollars, and the receipt of said payment upon the execution of said contract by said Hartenfeld Bag Company:—whereas as a matter of truth and fact said contract was a sham, and was intended to conceal from this defendant the real agreement between the parties thereto and was entered into by the said plaintiff and said Hartenfeld Bag Company for the purpose of securing to the plaintiff from said Hartenfeld Bag Company, through the suretyship of this defendant, the payment in merchandise of a previous existing indebtedness due from said Hartenfeld Bag Company to said plaintiff and no cash payment was made or intended to be made for the purchase of said merchandise;—but instead thereof the said plaintiff fraudulently endeavored by said concealment from this defendant of the real nature of the consideration to
528 obtain security for the payment of a previously existing indebtedness which it well knew said Hartenfeld Bag Company was otherwise unable to pay;—wherefore this defendant saith that the said supposed indemnifying bond in said declaration mentioned was and is void in law, and this the defendant is ready to verify;—wherefore it prays judgment if it ought to be charged with the said debt by virtue of the said supposed indemnifying bond, etc.

F. F. & J. V. NORCROSS,
Attorneys for said American Surety Company of New York.

STATE OF ILLINOIS,
County of Cook, ss:

Jay J. Reynolds makes oath and says that he is the duly authorized agent in this behalf of the defendant, American Surety Company of New York, in the above entitled cause, and that he verily believes that said American Surety Company of New York has a good defense to this suit upon the merits to the whole of the plaintiff's demand, and that the nature of such defense is set forth more particularly in the foregoing pleas filed in behalf of said defendant; and affiant states that, according to his best knowledge and belief, the said plaintiff did not faithfully perform all of the terms
529 covenants and conditions of said contract on its part to be performed as set forth in the plaintiff's declaration, and did not pay unto the said Hartenfeld Bag Company the said sum of Twenty-two Thousand one hundred ($22,100.00) dollars in ad-

vance, as recited in said contract;—that the real consideration for the agreement on the part of the said Hartenfeld Bag Company with said plaintiff was totally changed and different from the consideration mentioned in said contract, and that said change was made without the knowledge or consent of said defendant, American Surety Company of New York;—and that the execution of said indemnifying bond set forth in the plaintiff's declaration was fraudulently obtained from defendant Surety Company by said plaintiff and said Hartenfeld Bag Company by falsely representing that said contract was a bona fide contract for the purchase by said plaintiff of certain merchandise therein mentioned for cash, whereas, as a matter of fact the said plaintiff and the said Hartenfeld Bag Company concealed from said American Surety Company of New York that nothing was to be paid by the Hartenfeld Bag Company to the plaintiff and that the delivery of said merchandise to the said plaintiff should be in liquidation of a previous existing indebtedness due from the said Hartenfeld Bag Company unto said plaintiff.

"JAY J. REYNOLDS."

Subscribed and sworn to before me this 27th day of February 1919.

"WM. H. DAVENPORT,"
Notary Public.

530 DEFENDANT'S EXHIBIT D.

Replications in Chicago Suit.

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

Gen. No. B-48488.

AMERICAN MILLS COMPANY, a Corporation, Plaintiff,

vs.

HARTENFELD BAG COMPANY, a Corporation, and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Defendants.

I.

And the plaintiff as to the plea of the defendant, the American Surety Company of New York, firstly above pleaded, and which the defendant has prayed may be inquired of by the country, doth the like.

531 II.

And the plaintiff as to the plea of the defendant, the American Surety Company of New York, secondly above pleaded, says precludi non, because it says that the plaintiff was damnified in man-

ner and form, and at the time in its said declaration alleged; and of this the plaintiff puts itself upon the country.

III.

And the plaintiff as to the plea of the defendant, the American Surety Company of New York, thirdly above pleaded, says precludi non, because it says that the said plaintiff did faithfully perform all of the terms, covenants and conditions of the contract referred to in said indemnity bond on its part to be performed, as alleged in its said declaration; and did upon the execution of said contract pay unto the Hartenfeld Bag Company the said sum of, to-wit, Twenty-two thousand one hundred dollars ($22,100.00) for the purchase of the merchandise therein described to be thereafter delivered to it; that the plaintiff did not in manner and form as alleged in said second plea agree with the said Hartenfeld Bag Company that a previous existing indebtedness due unto the plaintiff from the said Hartenfeld Bag Company should stand in lieu of said cash payment as consideration for the delivery to the plaintiff of said merchandise referred to in said contract; that said defendant, the Ameri-
532 can Surety Company of New York, was not discharged and released from all liability as surety upon said bond of indemnity; and of this the plaintiff puts itself upon the country.

IV.

And the plaintiff as to the plea of the defendant, the American Surety Company of New York, fourthly above pleaded, says, precludi non, because it says that the plaintiff did upon the execution of said contract in said declaration set forth pay unto the Hartenfeld Bag Company the said sum of, to-wit, Twenty-two thousand one hundred dollars $22,100.00); and the said plaintiff did not agree with the said Hartenfeld Bag Company to accept said merchandise mentioned in said contract and indemnity bond in payment and discharge of an existing indebtedness then due to the plaintiff from the said Hartenfeld Bag Company; that the real consideration was, to-wit, the said sum of Twenty-two thousand one hundred dollars ($22,100.00) paid to the said Hartenfeld Bag Company by the plaintiff; that the real consideration for the agreement upon the part of the said Hartenfeld Bag Company to deliver said merchandise to the plaintiff was as in said contract is alleged, and was not totally or otherwise changed and different from the consideration mentioned in said contract; that the said defendant, the American Surety Company of New York, was not discharged and released from all liability as surety upon said indemnity bond; and of this the plaintiff
533 puts itself upon the country.

V.

And the plaintiff as to the plea of the defendant, the American Surety Company of New York, fifthly above pleaded, says precludi

non, because it says that the execution by the said defendant, the American Surety Company of New York, of said indemnity bond in said declaration mentioned was not obtained by the plaintiff and the said Hartenfeld Bag Company through fraud, covin and misrepresentation; that the said plaintiff and the said Hartenfeld Bag Company did not falsely and fraudulently represent to the defendant, the American Surety Company of New York, that said contract was for the purchase by the plaintiff of certain merchandise mentioned in said contract upon the payment in cash by the plaintiff to the Hartenfeld Bag Company, the principal in said indemnity bond, of the sum of Twenty-two thousand one hundred dollars ($22,100.00), and the receipt of said payment upon the execution of said contract, by the Hartenfeld Bag Company; that it is not a matter of truth and fact that said contract was a sham and was intended to conceal from said defendant, the American Surety Company of New York, the real agreement between the parties thereto, and was entered into by the said plaintiff and the said Hartenfeld Bag Company for the purpose of securing to the plaintiff from the said Hartenfeld Bag
534 Company, through the suretyship of the said defendant, the American Surety Company of New York, the payment in merchandise of a pre-existing indebtedness due from said Hartenfeld Bag Company to the plaintiff; and that it is not true that no cash payment was made or intended to be made for the purchase of said merchandise; and that it was not true that the plaintiff fraudulently endeavored to by "said concealment" from said defendant, the American Surety Company of New York of the "real" nature of the consideration "obtain security for the payment of a pre-existing indebtedness which it well knew said Hartenfeld Bag Company was otherwise unable to pay;" that said indemnity bond was not and is not void in law; and of this the plaintiff puts itself upon the country.

MOSES ROSENTHAL & KENNEDY,
Attorneys for Plaintiff.

535 In the Circuit Court of Cook County.

Gen. No. B-48488.

AMERICAN MILLS COMPANY, a Corporation, Plaintiff,

vs.

HARTENFELD BAG COMPANY, a Corporation, and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Defendants.

STATE OF ILLINOIS,
County of Cook, ss:

Hamilton Moses being first duly sworn, on oath deposes and says: that he is the duly authorized agent in this behalf of the plaintiff, American Mills Company, a corporation, in the above entitled cause; that according to his best knowledge and belief the plaintiff did faithfully perform all of the terms, covenants and conditions of said

contract on its part to be performed, as set forth in the plaintiff's declaration, and did pay unto the said Hartenfeld Bag Company the said sum of Twenty-two thousand one hundred dollars ($22,-
536 100.00), as was recited in said contract; that it is not true that the real consideration for the agreement on the part of said Hartenfeld Bag Company with said plaintiff was totally changed and different from the consideration mentioned in said contract, and that said change was made without the knowledge or consent of said defendant, the American Surety Company of New York; and that it is not true that the execution of said indemnity bond set forth in the plaintiff's declaration was fraudulently obtained from the said defendant, the American Surety Company of New York by the said Hartenfeld Bag Company by false representations that said contract was a bona fide contract for the purchase by said plaintiff of said merchandise therein mentioned, for cash; that it is not true as a matter of fact that the said plaintiff and the said Hartenfeld Bag Company concealed from the defendant, the American Surety Company of New York, that nothing was to be paid by the Hartenfeld Bag Company to the plaintiff and that the delivery of said merchandise to the plaintiff should be in liquidation of a pre-existing indebtedness due from the said Hartenfeld Bag Company unto the said plaintiff.

HAMILTON MOSES.

Subscribed and sworn to before me this 22nd day of September A. D. 1919.

[SEAL.] EDWARD A. COOPER,
Notary Public.

537 *Opinion of Judge Rose.*

In the United States District Court, Southern District of New York.

Equity. 16-36.

AMERICAN SURETY CO. OF NEW YORK, Plaintiff,

versus

AMERICAN MILLS COMPANY, Defendant.

ROSE, *District Judge:*

The plaintiff seeks the cancellation of a bond given to the defendant by the Hartenfeld Bag Company as principal, and itself as surety, and an injunction against suits thereon. The three corporations concerned are of New York, Georgia and Illinois, respectively, and will be herein severally called "The Surety," "The Mills" and "The Bag Company."

For seven years ending in 1918, the former had bought second hand bags from the latter, sometimes to the amount of One Hundred Thousand Dollars annually. Frequently, if not usually, payment had preceded delivery. In August, 1918, the Bag Company

was behind in its shipments, and some of the bags which it had furnished had been under grade. At that time, the Bag Company was a debtor to the Mills in the amount of about Twelve Thou-
538 sand Dollars. Nevertheless, when near the end of August the Mills bought more bags, the Bag Company persuaded it to give, for their purchase price, its notes, aggregating something over Nine Thousand Dollars.

The Bag Company had been in the habit of selling its accounts to the Commercial Credit Company of Baltimore. Notwithstanding that the notes of the Mills had fully paid for the last purchases, the Bag Company sold its bill for them to the Credit Company, and a few days later, discounted the promissory notes of the Mills with a Chicago banker. In this way it obtained double payment for bags which it had certainly never shipped, and which it had probably at that time not even bought.

On the 24th of September, through a telegram from the Credit Company telling The Mills that it had bought The Bag Company's account against it, and stating that a formal notice to that effect had been mailed, The Mills got wind of at least part of what had happened. In due course the letter of the Credit Company came to hand. It asked to be promptly informed if The Mills claimed any payment, credits, notes, &c. against the account. The Mills, surprised as it must have been, left the communications of the Credit Company unanswered, but within less than an hour after the receipt of the telegram, busied itself in another direction.

The president of The Mills wired the president of the Bag Company that he would arrive at the La Salle Hotel in Chicago
539 on the next evening, September 25th, and to meet him there without fail. The Bag Company's official was not on hand that night, but the next day, the president of The Mills did see him and for the next three days, they were in more or less constant touch with each other, and then, if not before, the president of The Mills learned that his company's notes had been discounted. It was explained to him that what had been done had been due to the mistake of a "bonehead clerk."

It is admitted that the president of The Bag Company said it was short of money. There is more or less dispute as to the details of what passed between the two men. It is asserted that the president of The Mills asked for money or for security, real estate or other, while he says he did not. He admits that he came to Chicago to get his account settled. What was actually done speaks for itself.

During the war, it not unfrequently happened that sellers of goods were forced to ask for advance payments, and some, if not all of the surety companies, got into the habit of guaranteeing deliveries to buyers. On one or two occasions, The Surety had done so much for The Bag Company.

As the result of whatever passed between the officials of The Mills and of The Bag Company, the latter, on the 27th entered into a formal contract to sell The Mills $22,100 worth more of bags and acknowledged the receipt of that sum of money. The con-
540 tract provided that deliveries under it should be guaranteed by a surety bond.

The president of The Mills admits that when he came to Chicago he had no intention of buying bags, and it is further admitted that prior to the receipt of the surety bond, he wired The Mills nothing was yet accomplished, but to hold any reply to the Credit Company.

The Bag Company took the contract to The Surety, and on the 28th, obtained from it the bond now in controversy by which The Surety guaranteed the deliveries. This bond was at once turned over to the president of The Mills, and on the same day he started back to Atlanta. The statement in the contract that the $22,100 had been paid was untrue. The president of The Mills on his return to Atlanta conferred with its counsel, and on October 1st had The Mills draw its check for $22,100 to the order of the Bag Company. The check was certified and then with it and his legal advisor he returned to Chicago on the 3rd of October. After having agreed with the president of The Bag Company that the latter was indebted to The Mills in the sum of $21,087.20 the latter drew its check for that amount. They then went to the bank of The Bag Company. The $22,100 certified check of The Mills was deposited to the credit of the Bag Company, and the latter's check for $21,087.20 was certified and handed to the president of The Mills. The difference between the face of the two checks was $1,012.80. It so happened that the only bags received by The Mills under the contract of September 27th were of the value of $1,050.00.

541 It follows that if the bond had never been obtained or is now unenforcible The Mills will be $37.20 better off for what took place between September 27th and October 3rd, 1918, and that if the bond be held good it will have profited to the amount of $21,087.20.

The president of The Mills admits that he understood when he made the so-called contract of September 27th that The Bag Company would pay his company all that it then owed it out of the price that The Mills agreed to pay for the bags of the new contract.

A further analysis of the facts is unnecessary. The making of the contract was obviously a mere means of inducing The Surety to guarantee the existing debt of The Bag Company. The Surety would never have executed the bond had it been told the facts, and it is certain that both the president of The Bag Company and the president of The Mills knew that it would not. The fraudulent character of the whole transaction is too obvious for further comment. The bond should be cancelled if this Court has in this case jurisdiction so to decree.

The Mills says it has none. Phœnix Mutual Life Ins. Co. v. Baily, 13 Wall., 616, and many cases since hold that as one who is sued at law upon a bond or policy, the execution of which by him was procured, as he asserts, by fraud, may there defend on that ground, he has an adequate remedy at law and has no claim to the interposition of equity. If The Mills had stood on its objec-

542 tion to the jurisdiction of equity, the line of authorities referred to would have been conclusive. It is, however, equally well settled that when as here, the subject matter is within the cognizance of a Court of Equity, the right of a defendant to object on the ground that there is a legal remedy may be waived;

McGowan v. Parish, 237 U. S. 295.

it is waived when the defendant by cross bill under the old practice or by counterclaim under the new, asks for affirmative relief.

Original Consolidated Mining Co. v. Abbott, 167 Fed. 681.

1 Street's Federal Equity Practice, Section 92. The similar principle was applied in Texas & Pacific Railway Company v. Eastin, 214 U. S. 153.

In this case, The Mills, while in its answer asserting that the plaintiff had an adequate remedy at law, went on to set up its counterclaim on the bond, and prayed for a decree against the Surety for $21,050., being the penalty of the bond, less $1,050. the value of the bags received by The Mills under the guaranteed contract. It said it did not thereby waive its objection to the jurisdiction of equity. In its present view, what it did was not voluntary on its part, but was required by the new equity rules. If it had not made a counterclaim, it says it would have imperiled it rights subsequently to recover upon the bond anywhere. Is that so?

543 If The Mills had rested upon its contention that the Chancellor was without jurisdiction, one of three things would have followed. This Court might have agreed with it. If so, nothing which took place in a forum into which it was taken against its will, and from which, upon its demand, it was dismissed for want of jurisdiction, could have injuriously affected its rights in any other tribunal. The Court might have retained jurisdiction and decided that The Surety had not made out a case for cancellation. The judicial decision that the bond was good, could not possibly have hurt The Mills in a subsequent prosecution of its suit at law instituted before the bill in equity was filed. The third possibility was that the Court might hold that the bond was invalid and should be cancelled. Then, of course, the controversy would be finally decided against the Mills, but that result would not have depended in whole or in part upon whether it had made or had refrained from making a counterclaim.

It follows that The Mills had no reason for asking affirmative relief except the hope of getting a decree against The Surety for the amount due on the bond. Under such circumstances, to make a counterclaim is to accept the jurisdiction of the Court of Equity. It becomes therefore unnecessary to decide whether in a case in which there are other reasons for setting up a counterclaim, good faith does not require that a defendant who wishes to stand to the end upon his objection to the equity jurisiction, should not move

544 to dismiss before answering, as the rules permit him to do, or if he includes both his Motion to Dismiss and his counterclaim in his answer, to make it plain that he does so only because his right to recover in another forum upon his counterclaim may not be prejudiced by his silence.

The Mills did neither of these things. At the hearing it offered evidence in support of its prayer for an affirmative decree against the Surety. No attempt to withdraw the counterclaim was made

until after the Court had emphatically expressed an opinion upon the merits. Its waiver of objection to the jurisdiction was complete. It is argued that this Court may not enjoin a prosecution of state court suits. That is doubtless true but is not here important. The Mills offered the bond in controversy in evidence. It is still in the custody of this Court.

A decree cancelling it is within the jurisdiction of this tribunal and when passed will make the invalidity of the bond res adjudicata as between the parties to this suit.

Upon reasonable notice, a draft decree in accordance with the conclusions herein reached may be submitted.

JOHN C. ROSE,
United States District Judge.

545 *Final Decree.*

At a Stated Term of the United States District Court Held in and for the Southern District of New York, at the Court Rooms, No. 233 Broadway, in the Borough of Manhattan, City, State and Southern District of New York, on 9th Day of February, 1920.

Present: Hon. John C. Rose, United States District Judge.

In Equity.

16-36.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff,

against

AMERICAN MILLS COMPANY, Defendant.

Decree.

This cause came on to be heard at this term and was duly argued by counsel and, thereupon, upon consideration thereof, it is on motion of Henry C. Willcox, Solicitor for plaintiff, Ordered, adjudged and decreed as follows:

First. That this Court has jurisdiction of this cause in equity.

Second. That the bond in the pleadings described, dated September 28, 1918, executed by the Hartenfeld Bag Company, as
546 principal, and plaintiff, as surety, to defendant in the sum of $22,000.00 conditioned in substance that the principal, the Hartenfeld Bag Company, shall idemnify defendant, American Mills Company, against any loss or damage directly arising by reason of the failure of said principal to faithfully perform the alleged contract therein described and thereto attached, dated September 27, 1918, between said Hartenfeld Bag Company and defendant, American Mills Company, was and is null and void and of no force or effect at law or in equity; and that the said bond is to be, and the same is hereby,

cancelled and the plaintiff herein, American Surety Company of New York, be, and it hereby is, discharged from any and all liability upon or by reason thereof.

Third. That the Clerk of this Court cancel said bond by writing across the face thereof "Cancelled and the surety, American Surety Company of New York, discharged by decree of the United States District Court, dated

" with the date of this decree, his signature and title of office; and that, he thereupon deliver such bond so cancelled to plaintiff or to its solicitor herein.

Fourth. That defendant's counterclaim against plaintiff demanding judgment for $21,050.00 with interest from December
547 14, 1918, with costs, be and the same hereby is, dismissed upon the merits thereof.

Fifth. That plaintiff recover of defendant its costs and disbursements to be taxed by the Clerk, and that plaintiff have execution against defendant therefor.

JOHN C. ROSE,
United States District Judge.

548 *Judgment.*

District Court of the United States, Southern District of New York.

Eq. 16-36.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff,

vs.

AMERICAN MILLS COMPANY, Defendant.

The plaintiff in the above entitled cause issued its summons on February 27th, 1919, and served said summons together with the bill of complaint herein on March 3rd, 1919, and filed same in the Supreme Court of the State of New York for the County of New York.

Thereafter the defendant herein filed its petition and bond for the removal of this action from said State Court to this Court, and on March 26th, 1919, the plaintiff filed in this Court a certified copy of the record on removal from said State Court, and at the same time served notice of said filing upon defendant's attorney.

An answer to said bill of complaint was filed for the defendant by Henry Uttal, Solicitor, on April 25th, 1919, and on May 1st, 1919, a reply to the defendant's counterclaim was filed by the plaintiff.

549 On May 9th, 1919, defendant moved to dismiss the complaint herein, which motion was denied without prejudice to such action as the trial Judge might deem proper, and an order thereon was filed on May 15th, 1919.

On July 1st, 1919, the plaintiff moved for a final decree in its favor for the relief demanded in the complaint, and at the same time the defendant renewed its motion to dismiss, both of which motions were denied by order filed July 3rd, 1919.

Testimony was thereafter taken by the respective parties, and filed in the clerk's office of the said District Court.

Afterwards, and at the November Term, 1919, of said Court, present the Honorable John C. Rose, Judge, the said cause came on to be heard on the pleadings and proofs, and was argued by counsel. On the 9th day of February, 1920, a decree of said Court was filed and entered in favor of the plaintiff by which it was adjudged that the bond described in the pleadings is null and void and thereby cancelled, and plaintiff discharged from all liability by reason thereof; that defendant's counterclaim be dismissed upon the merits, and that plaintiff recover its costs and disbursements to be taxed.

And the costs having been taxed by the clerk at Six Hundred Ten & 91/100 ($610.91) Dollars, the process, pleadings and decrees with other papers filed in said cause being duly annexed hereto.

550 Wherefore let the said American Surety Company of New York recover of the said American Mills Company the sum of Six Hundred Ten & 91/100 ($610.91) Dollars, costs as adjudged in said final decree.

Signed and enrolled this 21st day of February, A. D. 1920.

ALEX. GILCHRIST,
Clerk.

551 *Citation.*

By the Honorable Augustus N. Hand, a District Judge Sitting in the District Court of the United States for the Southern District of New York, in the Second Circuit, to American Surety Company of New York, Greeting:

Whereas the American Mills Company has lately appealed to the United States Circuit Court of Appeals for the Second Circuit from a decree of the United States District Court for the Southern District of New York made in favor of you, and has filed the security required by law.

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the district and circuit above named, on the 8th day of March, 1920, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein you are the plaintiff and appellee, and the American Mills Company is the defendant and appellant, to show cause, if any there be, why the final decree in said appeal mentioned should not be granted and speedy justice should not be done in that behalf.

552 Given under my hand at the Borough of Manhattan, in the City of New York in the district and circuit above named

this 9th day of February in the year of our lord one thousand nine hundred and twenty, and in the independence of the United States, the one hundred and forty-fourth.

AUGUSTUS N. HAND,
United States District Judge.

553 *Petition for Appeal.*

District Court of the United States, Southern District of New York.

In Equity.

16-36.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff,

against

AMERICAN MILLS COMPANY, Defendant.

The defendant, American Mills Company, conceiving itself aggrieved by the final decree made herein on the 9th day of February, 1920, and entered on the 9th day of February 1920, does hereby appeal from the said final decree, and each and every part thereof, to the United States Circuit Court of Appeals, for the Second Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it prays for an order allowing it, the said defendant, to prosecute said appeal, and that a transcript of the record, papers and proceedings upon which said final decree was made may be duly authenticated and sent to the United States Circuit Court of Appeals for the Second Circuit; and also that an order be made fixing the amount of security which the defendant shall give
554 and furnish upon such appeal, and upon the giving of said security all further proceedings in this court be superseded and stayed until the determination of the said appeal by the United States Circuit Court of Appeals for the Second Circuit; and that a citation be granted directed to the above named plaintiff, American Surety Company of New York, commanding it to appear before the United States Circuit Court of Appeals for the Second Circuit, to do and receive what may appertain to justice to be done in the premises.

And your petitioner will ever pray, etc.

Dated New York, N. Y., February 9th, 1920.

AMERICAN MILLS COMPANY,
By HENRY UTTAL,
Solicitor for Defendant and Appellant.

Office & P. O. Address, #32 Broadway, Borough of Manhattan, City of New York.

555 *Order Allowing Appeal.*

At a Stated Term of the United States District Court Held in and for the Southern District of New York, at the Court House and United States Post Office Building, in the Borough of Manhattan, City, State, and Southern District of New York, on the 9th Day of February, 1920.

Present: Honorable Augustus N. Hand, United States District Judge.

In Equity.

16-36.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff,

against

AMERICAN MILLS COMPANY, Defendant.

Upon the annexed petition of the defendant, American Mills Company, and upon motion of Henry Uttal, Esq., Solicitor for the defendant, it is

Ordered that the appeal of the defendant, American Mills Company, to the United States Circuit Court of Appeals for the Second Circuit, from the final decree heretofore made and en-ered
556 herein, be, and the same is hereby allowed, and that a certified transcript of the record, papers and proceedings herein be transmitted to the said United States Circuit Court of Appeals for the Second Circuit; and it is

Further ordered that the bond on appeal be fixed in the sum of $1,000.00 the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

AUGUSTUS N. HAND,
United States District Judge.

557 *Assignment of Errors.*

District Court of the United States, Southern District of New York.

In Equity.

16-36.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff,

against

AMERICAN MILLS COMPANY, Defendant.

The defendant herein, American Mills Company, conceiving itself aggrieved by the final decree made herein, on the 9th day of Feb-

ruary, 1920, and entered herein on the 9th day of February, 1920, now appears by its solicitor and presents, with the accompanying petition on appeal from said final decree and each and every part thereof, the following assignment of errors:

First. The Court erred in that it held that it had jurisdiction of this cause in equity.

Second. The Court erred in that it held that its exercise of jurisdiction in this case was not in violation of Section 723 of the Revised Statutes of the United States.

Third. The Court erred in denying the motion of the defendant to dismiss the plaintiff's complaint herein upon the ground
558 that the plaintiff had a plain, adequate and complete remedy at law.

Fourth. The Court erred in overruling the defense interposed by the defendant in its answer to the complaint that the plaintiff had a plain, adequate and complete remedy at law in the case pending in the Superior Court of Fulton County, Georgia.

Fifth. The Court erred in overruling the defense interposed by the defendant in its answer to the complaint that the plaintiff had a plain, adequate and complete remedy at law in the case pending in the Circuit Court of Cook County, Illinois.

Sixth. The Court erred in that it held that the contract of September 27th, 1918, between the American Mills Company and the Hartenfeld Bag Company was a sham and a fraudulent contract and not binding or intended to be binding upon the American Mills Company or the Hartenfeld Bag Company.

Seventh. That the Court erred in that it held that the said contract of September 27th, 1918, was entered into between the American Mills Company and the Hartenfeld Bag Company for the purpose of obtaining the bond, which is the subject of this action, from the American Surety Company.

559 Eighth. The Court erred in that it held that the plaintiff was induced to execute and deliver, and did so execute and deliver, the bond dated September 28th, 1918, to the said Hartenfeld Bag Company because of the alleged fraud and alleged misrepresentations of this defendant.

Ninth. The Court erred in that it held that the payment of $22,100 made by the American Mills Company to the Hartenfeld Bag Company, and of $21,087.20 made by the Hartenfeld Bag Company to the American Mills Company on October 3rd, 1918, was a mere exchange of checks pursuant to the said alleged fraudulent contract.

Tenth. The Court erred in that it directed that the bond dated September 28th, 1918, executed by the Hartenfeld Bag Company as principal, and the plaintiff as surety, which bond is the subject of this action, was and is null and void and of no force or effect in law

or in equity; and in that the Court directed that the said bond be cancelled, and the plaintiff herein be discharged from any and all liability upon or by reason thereof.

Eleventh. The Court erred in that it directed the Clerk of the Court to cancel said bond.

Twelfth. The Court erred in denying the motion of the defendant to withdraw its counterclaim against the plaintiff for the sum
560 of $21,050 with interest from December 14th, 1918, as demanded in the answer herein.

Thirteenth. The Court erred in that it directed that the plaintiff recover of the defendant its costs and disbursements.

HENRY UTTAL,
Attorney for Defendant and Appellant.

Office & P. O. Address, #32 Broadway, Borough of Manhattan, City of New York.

561 *Supersedeas Bond.*

District Court of the United States, Southern District of New York.

In Equity.

16-36.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff,

vs.

AMERICAN MILLS COMPANY, Defendant.

AMERICAN MILLS COMPANY, Appellant,

vs.

AMERICAN SURETY COMPANY OF NEW YORK, Respondent.

Know all men by these presents, that we, American Mills Company, a Georgia Corporation, and Maryland Casualty Company, a Maryland Corporation, are held and firmly bound unto the above named American Surety Company of New York in the sum of One Thousand ($1,000.00) Dollars, to be paid to the said American Surety Company of New York, for the payment of which well and truly to be made, we bind ourselves and each of us, our suc-
562 cessors and assigns jointly and severally firmly by these presents. Sealed with our seals and dated the 11th day of February, in the year of our Lord one thousand nine hundred and twenty. Whereas the above named American Mills Company has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit to reverse the decree rendered in the above entitled suit by John G. Rose, Judge of the District Court of the United States for the Southern District of New York.

Now therefore, the Condition of this obligation is such, that if the above named American Mills Company shall prosecute said appeal to effect and answer all damages and costs, if it fail to make said appeal good, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

AMERICAN MILLS CO., [L. S.]
By A. MAY,
President. [SEAL.]
MARYLAND CASUALTY COMPANY, [L. S.]
By F. MORRIS MILLER,
[SEAL.] *Attorney-in-fact.*

563 GEORGIA,
Fulton County:

On this, the 11th day of February, 1920, before me came Armand May, to me known, who by me being duly sworn did depose and say that he resides in the City of Atlanta, County of Fulton, State of Georgia; that he is President of American Mills Company, one of the corporations described in and which executed the within bond; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation and that he signed his name thereto by like order.

[SEAL.] CECIL MEYER,
Notary Public, Fulton County, Georgia.

564 STATE OF GEORGIA,
Fulton County:

I, Arnold Broyles, Clerk of the Superior Court of said County which Court is a Court of record, do hereby certify that Cecil Meyer is a duly appointed Notary Public in and for said State and County, and that he was appointed on the 15th day of September, 1917, and that his commission as such Notary expires with the 14th day of September, 1921, and that he resides in said County of Fulton.

I further certify that I am acquainted with the Signature of the said Cecil Meyer as such Notary Public, to the instrument hereto attached; that the same is genuine, and that, under the laws of Georgia, he is authorized to attest Deeds and instruments for record, take acknowledgements and administer oaths.

In witness of all of which, I hereunto subscribe my name and affix the Seal of this Court, this the 11th day of Feby. 1920.

ARNOLD BROYLES,
Clerk of the Superior Court of Fulton County, Ga.

Endorsed.

The within bond is hereby approved as to form and sufficiency, Feb. 13/20.

AUGUSTUS N. HAND,
U. S. D. J.

565 *Præcipe on Appeal.*

District Court of the United States, Southern District of New York.

In Equity.

16-36.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff,

against

AMERICAN MILLS COMPANY, Defendant.

To the Clerk:

You are requested to take a transcript of the record herein, to be filed in the United States Circuit Court of Appeals for the Second Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record, the following, and no other papers or exhibits, to wit:

1. The bill of Complaint and the exhibits thereto annexed and made part thereof.

2. The notice of motion of the defendant, dated April 25, 1919, that the complaint be dismissed, and the affidavits of Henry Uttal and Herbert J. Haas, and the exhibits thereto attached; the
566 answering affidavits of Henry C. Willcox, attorneys for the plaintiff, used upon said motion.

3. Judge Julius M. Mayer's order, dated May 9th, 1919, denying said motion without prejudice.

4. The answer of the defendant and the exhibits thereto annexed and made parts thereof.

5. The reply of the plaintiff.

6. Plaintiff's notice of motion, dated May 16, 1919, for a final decree on the pleadings.

7. Judge Julius M. Mayer's opinion, upon said motion.

8. Judge Julius M. Mayer's order denying plaintiff's motion, and denying defendant's motion to dismiss the complaint without prejudice, dated July 1st, 1919.

9. Opening statement of counsel for the plaintiff, upon the trial of this action.

10. Testimony and exhibits, in accordance with statement annexed hereto, and made part hereof.

11. Argument of counsel for the defendant.

12. Judge John C. Rose's opinion.

567 13. Judge John C. Rose's final decree, dated February 9th, 1920.

14. Judgment.

15. Defendant's petition of appeal from said final decree.

16. Judge A. N. Hand's order, dated February 9th, 1920, allowing said appeal.

17. Defendant's assignments of error.

18. Citation.

19. Supersedeas bond, eliminating therefrom the printed portion showing the justification of the surety.

20. Judge A. N. Hand's order, dated March 3rd, 1920, enlarging defendant's time to file record and docket case.

21. Judge A. N. Hand's order, dated April 30th, 1920, enlarging defendant's time to file record and docket case.

22. This præcipe.

23. Certificate of Clerk of District Court.

Dated, New York, N. Y., May 21, 1920.

HENRY UTTAL,
Solicitor for Defendant-Appellant.

568 *Statement Annexed to and Made Part of Plaintiff's Præcipe.*

District Court of the United States, Southern District of New York.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff,

vs.

AMERICAN MILLS COMPANY, Defendant.

Testimony and Exhibits to be Incorporated into Printed Record on Appeal in the Above Entitled Action.

The testimony of the following witnesses is in narrative form:

Frank B. Woltz,
Harold E. Foreman,
Edith F. Sutton,
Warren H. Burns,
Jay J. Reynolds,
Jay J. Reynolds,
William F. Langille,
A. M. Bergstrom.

569 The testimony of the following witnesses is in question and answer form:

Armand May,
Edward J. Hartenfeld,
Herbert Haas,
Samuel Lovitt,
L. G. Strauss,
Armand May, At Trial;
Armand May, Before Referee Adams.

The following exhibits were introduced at the respective hearings:

Depositions August 12th, 1919, et seq., at Chicago, Illinois.

Plaintiff's Exhibits.

1. Defendant's check dated October 1st, 1918, for $22,100.

2. Hartenfeld Bag Company's check dated October 3rd, 1918, for $21,087.20.

3. Defendant's telegram September 27th, 1918, "Hold commercial reply."

4. Summons and complaint in New York action as to paragraph 22 showing contract.

5. Exhibit "A" attached to American Mills Company's petition in Georgia suit, being contract with Hartenfeld Bag Company
570 dated September 27th, 1918.

6. Defendant's statement of October 1st, 1918 showing how balance of $21,087.20 is arrived at and bearing receipt of Armand May dated October 3rd, 1918.

Defendant's Exhibits.

1. Financial statement of Hartenfeld Bag Company on American Surety blank dated August 31st, 1917.

Depositions September 25th, 1919, et seq., at Atlanta, Georgia.

Plaintiff's Exhibits.

1. Defendant's check dated October 1st, 1918 for $22,100. (This is the same as Exhibit 1 of depositions taken at Chicago, August 12th, 1919.)

2. Defendant's statement of October 1st, 1918 showing how balance of $21,087.20 is arrived at and bearing receipt of Armand May dated October 3rd, 1918. (This is the same as Exhibit 6 of depositions taken at Chicago, August 12th, 1919.)

3. Defendant's letter to Hartenfeld Bag Company June 25th, 1918 (two pages); also statement #1674 of Hartenfeld Bag Company dated June 20th, 1918 for interest $98.10.

4. Defendant's letter to Hartenfeld Bag Company 7/6/18 (one page).

571 5. Defendant's letter to Hartenfeld Bag Company 7/9/18 (two pages).

6. Defendant's letter to Hartenfeld Bag Company 7/16/18 (three pages).

7. Defendant's letter to Hartenfeld Bag Company 7/18/18 (one page).

8. Defendant's letter to Hartenfeld Bag Company 2/28/18 (three pages).

9. Defendant's letter to Hartenfeld Bag Company 9/3 or 4/18 (one page).

10. Defendant's letter to Hartenfeld Bag Company 9/9/18 (one page).

11. Hartenfeld Bag Company's invoice, #1794, August 29th, 1918 for $9,225.

12. Defendant's telegram, September 12th, 1918 to Hartenfeld Bag Company. "Tried you on phone." (This appears in testimony original page 174.)

13. Hartenfeld Bag Company's telegram to defendant September 12th, 1918 "Writer absent" "Lovitt come to Chicago." (This appears in testimony original page 174.)

14. Defendant's note September 14, 1918, $4,485.08 to order of Hartenfeld Bag Company.

572 15. Defendant's note September 14, 1918, $4,650.00 to order of Hartenfeld Bag Company.

16. Defendant's telegram to Hartenfeld Bag Company September 24, 1918 "Will buy coffee after."

17. Defendant's telegram to Hartenfeld Bag Company "arrive La Salle" September 24, 1918.

18. Important legal notice Commercial Credit Company to defendant September 23, 1918.

19. Telegram to defendant September 24, 1918 signed "Eddie."

19a. Defendant's letter to Hartenfeld Bag Company 9/23/18 returning

Invoice 1824—$100.34 int. on $4,485.08 notes
Invoice 1825— 89.29 int. on 4,650.00 "

20. Contract with pencil notations.

21. Copy of final contract, September 27th, 1918.

22. Telegram of Armand May to defendant September 27, 1918 "Hold commercial reply." (This is the same as Exhibit 3 of depositions taken at Chicago, August 12, 1919.)

23. Hartfeld Bag Company's check dated October 3rd 1918 for $21,087.20. (This is the same Exhibit 2 of depositions
573 taken at Chicago, August 12th, 1919.)

24. Defendant's letter to Commercial Credit Company 10/5/18.

25. Defendant's letter to Hartenfeld Bag Company 10/5/18.

26. Defendant's letter to Hartenfeld Bag Company 10/8/18.

27. Hartenfeld Bag Company's letter to defendant 10/12/18.

28. Defendant's letter to Hartenfeld Bag Company 10/16/18.

29. Defendant's letter to Commercial Credit Company November 29, 1918.

30. Defendant's letter to Hartenfeld Bag Company 7/24/18. (This appears in testimony original page 147).

31. Defendant's letter to Hartenfeld Bag Company August 13, 1918. (This appears in testimony original page 152).

32. Defendant's letter to Hartenfeld Bag Company August 23, 1918. (Three pages.) (This appears in testimony original page 165).

Defendant's Exhibits.

1. Hartenfeld Bag Company's letter to Defendant July 3rd, 1918.

574 Depositions, September 16th, 1919, et seq., at Chicago, Illinois.

Plaintiff's Exhibits.

1. General Contract of indemnity signed by Hartenfeld Bag Company June 26, 1918.

Exhibits Received at Trial in New York.

Defendant's Exhibit "A."

Certified copy of all papers in Georgia suit as follows:

1. Original petition.

2. Process and service.

3. Demurrer of American Surety Company.

4. Answer of American Surety Company.

5. Amended answer of American Surety Company.

6. Plea in bar, etc.

7. Amended plea in bar, etc.

8. Motion to strike plea in bar.

9. Order overruling motion.

575 10. Exceptions pendente lite.

11. Order.

12. Certification.

Defendant's Exhibit "B."

Certified copy of all papers in Illinois suit as follows:

1. Declaration and certification.

Defendant's Exhibit "C."

Certified copy of all papers in Illinois suit as follows:

2. Answer (plea) in Illinois case. American Mills Company vs. American Surety Company.

Defendant's Exhibit "D."

Certified copy of all papers in Illinois suit as follows:

3. Replication of American Mills Company in Illinois action.

576 *Order of Judge Rose as to Approval of Record.*

At a Stated Term of the United States District Court for the Southern District of New York Held at the Court House and Post Office Building, in the Southern District of New York, on the 28th Day of June, 1920.

Present: Honorable John C. Rose, United States District Judge.

In Equity.

16—36.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff,
against
AMERICAN MILLS COMPANY, Defendant.

Defendant-appellant in above entitled action, having applied to this court for an order approving of the record on appeal herein, and

such application having come on to be heard and being argued by counsel, thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed, as follows:

I. That the defendant-appellant's application to include in the transcript on appeal to the circuit Court of Appeals the open-
577 ing statement of counsel for the plaintiff and the opening statement of counsel for the defendant, or either of them, be and the same hereby is, denied.

II. That the defendant-appellant's application to include in the transcript on appeal herein the argument of counsel for defendant upon the trial of the above entitled action be, and the same hereby is, allowed to the extent of including in such transcript, immediately after the words "Both sides rest," so much of said argument as is set forth and contained in the attached statement thereof, so much of this Order as includes the argument in said transcript not being intended as any expression of opinion as to whether it should properly form part thereof, but merely to give the parties the benefit of what actually in fact took place, if there is any benefit to them, or either of them, derivable therefrom.

III. That defendant-appellant's statement of the papers and evidence which it is sought to have included in the transcript on appeal, as contained in its præcipe dated May 21, 1920, and the proposed statement of the evidence attached thereto, be approved as amended, corrected and modified by this order and by appellee's objections and amendments dated May 29, 1920, by appellant's acceptance of June 3rd, 1920, and by the stipulation of the parties of June 4, 1920.

JOHN C. ROSE.
United States District Judge.

578 *Stipulation.*

United States District Court, Southern District of New York.

AMERICAN SURETY COMPANY OF NEW YORK

vs.

AMERICAN MILLS COMPANY.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, November 11, 1920.

HENRY C. WILLCOX,
Attorney for Plaintiff.

HENRY UTTAL,
Attorney for Defendant.

579 & 580 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff,

vs.

AMERICAN MILLS COMPANY, Defendant.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter as agreed on by the parties to be made up in accordance with plaintiff's præcipe and the order of Honorable John C. Rose, Judge, thereon.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 11th day of November, in the year of our Lord one thousand nine hundred and twenty and of the Independence of the said United States the one hundred and forty-fifth.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk.

581 *Opinion.*

United States Circuit Court of Appeals for the Second Circuit, October Term, 1920.

No. 169.

Argued March 9, 1921. Decided April 13, 1921.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff-Appellee,

v.

AMERICAN MILLS COMPANY, Defendant-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

Before Ward, Hough, and Manton, Circuit Judges.

Appeal from the District Court for the Southern District of New York. Suit by the American Surety Company of New York, plaintiff, against the American Mills Company, defendant, for an injunction. Decree for plaintiff; defendant appeals. Affirmed.

582 Henry Uttal, Esq., for Defendant-Appellant; Herbert Haas, Esq., of Counsel.

Henry C. Wilcox, Esq., for Plaintiff-Appellee; Henry C. Wilcox, Esq., Allan C. Rowe, Esq., of Counsel.

MANTON, *Circuit Judge:*

The appellant was a jobber and a dealer in second hand bags and burlap at Atlanta, Ga. The Hartenfeld Bag Company was in business in Chicago, Ill., as a dealer in second hand bags and burlap. Its business was collecting second hand bags, cleaning and repairing them and reselling them to the bag trade. The appellant had previously, during the course of several years, purchased bags in considerable amounts from the Bag Company. Very frequently the business was conducted as follows: the appellant would secure orders from its customers and then buy the second hand bags and burlap necessary to fill such orders from the Bag Company. Payment was made to the Bag Company in advance as soon as the contract of purchase was made, by giving the appellant's notes which the Bag Company discounted in Chicago, thus raising the money to finance its transactions. In 1918, owing to the war conditions, there was a shortage of burlap and the appellant placed orders for large amounts of merchandise with the Bag Company, paying in advance in
583 the manner described. However, when it came to delivery, the Bag Company failed to do so in several instances, and in some cases where deliveries were made, the customers of the appellant to whom the bags were sent, made complaint both of shortage in quantity and inferiority in quality. In some instances it resulted in rejectment of shipments. The appellant, under contract to deliver the merchandise to its customers, for which it had already paid the Bag Company, was forced to unusual efforts in the Summer of 1918, to secure from the Bag Company prompt deliveries of unfilled orders and to make good shortages and substitution of good bags and burlap for those which had been rejected. This resulted in a controversy with extended correspondence, and extensive promises which apparently were not kept. On August 29, 1918, while this condition of affairs existed, the Bag Company sold to the appellant a carload of bags and burlap for shipment to Atlanta for Nine thousand two hundred and twenty-five dollars. The appellant did not pay in advance for these goods, but purchased on open account, payable in ninety days. The carload was shipped to Atlanta on August 30, 1918, and on the same day, the Bag Company assigned the ninety day account against the appellant for Nine thousand two hundred and twenty-five dollars, the purchase price of this car, to the Commercial Credit Company of Baltimore. This company makes a business of loaning money on the purchase or dis-
584 count of accounts receivable. The matter of this assignment was unknown to the appellant until September 24, 1918, following. The unsatisfactory deliveries and replacement of shortages and defective bags continued until September 24, 1918. On that date, the parties met in Chicago, and it was then stated by the President of the Bag Company that he could not make some of the deliveries or replacements to which the appellant was entitled, and it was finally agreed that for such non-deliveries, shortages and defective deliveries, the Bag Company owed the appellant Eleven thousand nine hundred and fifty-one and 41/100 Dollars. This adjust-

ment did not take into consideration the open account which was assigned as aforesaid. The Bag Company was unable to pay the Eleven thousand nine hundred and fifty-one and 41/100 dollars in cash, and it was finally agreed that the Bag Company should pay the appellant Twenty-seven hundred and twenty-six and 41/100 dollars, and give notes for Nine thousand two hundred and twenty-five dollars, making together the Eleven thousand nine hundred fifty-one and 41/100 dollar debt, and that the appellant should give to the Bag Company its notes for Nine thousand two hundred and twenty-five dollars in payment of the car of August 29, 1918, which had been sold under ninety days' credit and which account had been assigned to the Commercial Credit Company. Notwithstanding such assignment, the appellant agreed to give notes for it. The
585 appellant disclaims knowledge of such assignment to the Commercial Credit Company. When the parties started to draw the notes, it was then recalled that there was another small debt from the Bag Company which had been overlooked. So this indebtedness was deducted from the appellant's notes and on September 14, 1918, the appellant gave the Bag Company one note for Forty-six hundred and fifty dollars due December 18th, 1918, and another note for Forty-four hundred eighty-five and 8/100 dollars due January 5, 1919, in payment of the car shipped to Atlanta on August 29, 1918, which had been sold on open account. The Bag Company discounted the appellant's notes with a banking house in Chicago, and received credit therefor. When on September 24, 1918, the appellant was requested to pay by the Commercial Credit Company, it at once communicated with the Bag Company. At this time the Bag Company owed the appellant the Nine thousand two hundred and twenty-five dollars in notes and other matters aggregating about Twelve thousand dollars, for which the appellant had no security. The President of the appellant went to Chicago, without acknowledging or answering the demand of the Commercial Credit Company, for the purpose of discussing matters and arriving at a settlement with the Bag Company. The president of the Bag Company stated that the assignment of the account to the Com-
586 mercial Credit Company was due to an error and that in his absence a "bonehead" clerk had filled out one of the blank forms and assigned the account without his knowledge, to the Credit Company. But it was apparent that the Bag Company was in bad financial condition and this was made known to the appellant. However, the president of the Bag Company stated that while he had no ready cash, he had considerable volume of merchandise on hand which would permit him to pay in sixty days. The following transaction then took place: a contract was drafted by which it was made to appear that the Bag Company should sell and deliver to the appellant merchandise therein specifically amounting to Twenty-two thousand one hundred dollars, a little more than enough to pay the appellant in full, and provided as follows: "which the American Mills Company agrees to pay cash upon the conditions that this contract is completed within 75 days after date." It provided that the Bag Company would secure a good surety company bond guar-

anteeing the performance by the Bag Company. At the time, it was very apparent that the President of the appellant did not go to Chicago for any purpose other than to adjust the indebtedness then owing. Nothing indicates a desire to buy other merchandise. No satisfactory explanation is given why another purchase of bags should have been made under the circumstances. Later, there was substituted in the contract the following words:

587 "The amount of this contract is $22,100, paid to H. B. C. (Hartenfeld Bag Co.) upon the execution of this agreement, the receipt whereof is hereby acknowledged. In the event that the said H. B. Co. shall not make delivery of the said bags on or before 75 days after the date hereof said H. B. Co. shall retain of said $22,000. only so much thereof as will pay at the contract rate for such bags if any as have been delivered and accepted by A. M. Co. (American Mills Co.) and said H. B. Co. shall at the expiration of 75 days immediately return to A. M. Co. the difference between said $22,000. and the price of the bags delivered."

Thus substituted a contract which called for payment on delivery, into one which apparently called for an immediate advance payment and for delivery or a refund of the money. Under this change in the contract, the surety was liable, not only for damages above the contract price for failure to deliver bags, but for actual delivery of the bags or repayment of the whole recited consideration. This change made by the attorney for the purchaser, was disadvantageous to the ostensible purchaser and is some evidence that the contract was not what it appeared to be, but a mere cover for an agreement to deliver merchandise in the future for the payment of debts
588 existing and to be assumed for over Twenty-one thousand dollars, and was made solely in order to make the surety liable for the payment of the debt, either by delivery of merchandise or cash. No other satisfactory explanation is made why a creditor which did not want to buy goods and did not go to Chicago therefor, should voluntarily change the apparent contract from one which would not require the creditor to make an advance payment to one which did.

The trial judge concluded that the contract in question was a mere blind or fraud to conceal the real agreement and that the form in question was adopted to conceal the real transaction under the guise of a sale in good faith with an advance payment. Its purpose was plain. It was intended to induce a surety to execute a bond and by its bond become liable for the payment of a debt then due and to be assumed from the Bag Company to the appellant. It was clear to the trial judge, as it is to us, that the purpose of the parties was to exchange this unsecured claim, which the appellant had of Twelve thousand dollars, plus the Nine Thousand two hundred and twenty-five dollars indebtedness of the appellant to the Credit Company, by virtue of the assignment of the claim, into a claim of merchandise or money if the merchandise was not delivered in seventy-five days, and to secure it by a bond of a surety company. What took place

at the time of the execution of this contract, together with the
589 explanations as disclosed by the record, satisfy us of the correctness of this finding in the lower court. The appellee executed this bond. After its execution, the correspondence between the parties and their course of conduct verifies the conclusion that it was a fraud attempted to be perpetrated to secure payment to the appellant.

But the validity of the decree below is attacked upon the ground that the district court did not have jurisdiction. It appears that after a default was made by the Bag Company in carrying out this contract, the appellant sued the Surety Company, in the Illinois State Court on the bond, together with the Bag Company, and served both defendants. A few days later, it sued in the State courts in Georgia. Process was served only on the appellee, because it could not be served upon the Bag Company in that State. Before answer in either suit, the appellee brought a suit in the New York Supreme Court alleging fraud in obtaining the execution and delivery of this bond and asking for its cancellation and surrender. Because of diversity of citizenship, the appellant moved the case to the District Court of the United States for the Southern District of New York. The appellant thereupon interposed an answer alleging that equity had no jurisdiction because it had an adequate remedy at law, maintaining that in actions at law pending in the courts of the States of Illinois and Georgia, it could defend upon the ground of fraud. The appellant also pleading a counterclaim upon a cause
of action at law and claimed breaches against the appellee
590 and asked for judgment for Twenty-one thousand and fifty dollars. This was the same sum as claimed by the appellant in the suits in Illinois and Georgia. The prayer for relief was as follows:

"Wherefore, defendant demands judgment dismissing the complaint with costs and for affirmative judgment against the plaintiff on defendant's counterclaim for the sum of $21,050. with interest thereon from the 14th of December, 1918 with costs."

A reply was interposed by the appellee to the material allegations of the counterclaim and separate defenses thereto were interposed. A motion was made for judgment on the pleadings, which was denied without prejudice to renewal at the trial. Another application was made for a final decree on the pleadings on the ground that the admissions in the appellant's answer entitled the appellee to the relief sought. In opposition to this motion, the appellant moved for a dismissal on the ground that equity had no jurisdiction because the appellee had an adequate remedy at law. This motion was denied without prejudice. On the trial at the close of the appellee's case, the appellant called witnesses and endeavored to establish the allegations of the counterclaim. At no time during the trial was the application to dismiss renewed upon the ground that the appellee had an adequate remedy at law. The court thereupon in-
591 dicated its determination to decide in favor of the appellee and against the appellant on the facts and stated that the only question which it desired to have argued was on the question

of law. Thereupon, the appellant urged that there was no equitable jurisdiction for the reason that the appellee had an adequate remedy at law, and the court ruled that since the counterclaim was interposed and the appellant asked affirmative relief, it had submitted itself to the jurisdiction of a court of equity and gave a decree against the appellant.

A bill in equity does not lie in any case where a plain, adequate and complete remedy may be had at law. (Singer Sewing Machine Co. v. Benedict, 229 P. S., 481.) But the objection to such jurisdiction may be waived. We think equity did not have jurisdiction but for the waiver of the appellant. Pleading its counterclaim in the answer and thereafter insisting upon it at the trial and offering proof to sustain it, constituted a waiver. The equity power having been invoked, the right of the defendant to object because of the existence of a legal remedy, can be waived. (McGowan v. Parish, 237 U. S., 285.) The appellee stated and proved its right to equitable relief to prevent being harassed by suits on the bond, which was procured through fraud, and while it had an adequate remedy at law in defending any suit which was attempted to be maintained on the bond, still appellant having consented by its pleas to remain in the equity court, the jurisdiction to try the case was complete.

592 In McGowan v. Parish (237 U. S., 285) the court said:

"But a court of equity ought to do justice completely and not by halves; and a cause once properly in a court of equity for any purpose will ordinarily be retained for all purposes, even though the court is thereby called upon to determine legal rights that otherwise would not be within the range of its authority. Camp v. Boyd, 229 U. S. 531."

The rule was stated in Southern Pacific R. R. v. U. S. (200 U. S., 341):

"It is undoubtedly true that a suit in equity cannot be maintained when there is a plain, adequate and complete remedy at law. Such is the mandate of the Revised Statutes, §723, as well as the general rule in equity. Lewis v. Cocks, 23 Wall., 466; Killian v. Ebbinghaus, 110 U. S., 568; Lichfield v. Ballau, 114 U. S., 190; Allen v. Pullman's Palace Car Company, 139 U. S., 658. It is also true that this objection need not always be raised by some pleading, but may be presented on the hearing even in the appellate court, and if not suggested by counsel may be enforced by the court on its own motion. See authorities just cited. But on the other hand it is equally

593 true that where the objection that the plaintiff has an adequate remedy at law is not made until the hearing, and the subject matter is of a class over which a court of equity has jurisdiction, the court is not necessarily obliged to entertain it, even though if taken in limine it might have been worthy of attention. Wylie v. Coxe, 15 How. 415, 420; Reynes v. Dumont, 130 U. S., 354, 395; Kilborn v. Sunderland, 130 U. S., 505, 514; Brown v. Lake Superior Iron Company, 134 U. S., 530; Insley v. United States; 150 U. S., 512, 515; Perego v. Dodge, 163 U. S., 160, 164; 1 Daniell's Chan. Pl. & Pr. (4th ed.), p. 555."

At no time did the appellant raise the objection until after it had pleaded its counterclaim and while a motion to dismiss the bill was made and denied in advance of trial, this was done without any prejudice to a renewal. In place of renewing at the commencement of the trial, the appellant proceeded with the trial and offered proof of its counterclaim and asked for judgment. When it observed that judgment on the facts was going against it, then for the first time during the course of the trial it insisted that the appellee had an adequate remedy at law. We think this conduct at the trial was tantamount to invoking the aid of a court of equity to exercise its jurisdiction in this case. Offering proof before the court,
594 without a jury, waived any objection to the jurisdiction of the court in equity to try and dispose of the suit. (Merchants Heat & Light Co. v. Clow & Sons, 204 U. S., 286). In that case the court said:

"But by setting up its counterclaim, the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action and by invoking submitted to it.

* * * * * * *

"There is some difference in decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in the proper sense he submits. * * * As we have said, there is no question at the present day that, by an answer in recoupment, the defendant makes himself an actor and, to the extent of his claim, a cross plaintiff in the suit."

But the appellant insists that because of Rule 30 of the new Equity Rules, he was obliged to plead his counterclaim and offer proof thereof in this action in equity. Rule 30 in part provides:

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of
595 the suit and may, without cross bill, set out any set off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set off or counterclaim so set up shall have the same effect as a cross suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross claims."

The courts never intended, nor had they the power to compel a defendant to plead a purely legal cause of action as a counterclaim to a suit in equity, and Rule 30 was never so intended. To do so would be in conflict with the Seventh Amendment of the Federal Constitution, which provides:

"In suits at common law, where the value in controversy shall exceed Twenty dollars, the right of trial by jury shall be preserved."

The facts which might constitute a counterclaim can be pleaded in an equity action as a defense or answer by way of cross suit and "so as to enable the court to pronounce a final judgment in the same suit, both on the original and cross bills." What the appellant did here was voluntary—not compelled by any rule—to assert a cause of action at law by way of the counterclaim. This conduct was an election to proceed without a jury. (Robb v. Vos, 155
596 U. S. 13; A. Klipstein & Co. v. Grant, 141 Fed. 72.) As the cause proceeded, the trial judge had it within his power to dismiss appellee's cause of action (if he concluded it was without merit) and could have retained jurisdiction on the questions presented by the proofs as to the counterclaim and could have rendered judgment on the merits thereof in favor of the appellant or appellee. The issue as to the counterclaim was presented by the reply to it, and the defenses there interposed. Where a party thus proceeds to trial before the court without objection or exception, he voluntarily waives his right to jury. (Kearney v. Case, 79 U. S., 275; Perego v. Dodge, 163 U. S., 160.)

We think the court below had jurisdiction under the circumstances, and we agree with the conclusions reached below.

Decree affirmed.

597 *Order for Mandate.*

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 23rd Day of April, One Thousand Nine Hundred and Twenty-one.

Present:

Hon. Henry G. Ward,
Hon. Charles M. Hough,
Hon. Martin T. Manton,
Circuit Judges.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff-Appellee,

v.

AMERICAN MILLS COMPANY, Defendant-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

598 On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. G. W.
C. M. H.

(Endorsed:) United States Circuit Court of Appeals—Second Circuit—American Surety Co., v. American Mills Co.—Order for Mandate—United States Circuit Court of Appeals—Second Circuit—Filed—Apr. 25, 1921—William Parkin—Clerk.

599 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 598 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of American Surety Company of New York, against American Mills Company as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 29th day of June in the year of our Lord One Thousand Nine Hundred and Twenty-one and of the Independence of the said United States the One Hundred and forty-fifth.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

[SEAL.] WM. PARKIN,
Clerk.

600 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which American Mills Company is appellant, and American Surety Company of New York is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court
601 of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-second day of October, in the year of our Lord one thousand nine hundred and twenty-one.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

602 [Endorsed:] File No. 28,360. Supreme Court of the United States, October Term, 1921. No. 405. American Mills Company vs. American Surety Company of New York. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 3, 1921. William Parkin, Clerk.

603 Supreme Court of the United States, October Term, 1921.

No. 405.

AMERICAN MILLS COMPANY, Petitioner,

vs.

AMERICAN SURETY COMPANY OF NEW YORK, Respondent.

It is stipulated and agreed that the certified transcript of record already on file with the Clerk of the Supreme Court of the United States, be taken as the return to the writ of certiorari in the above entitled cause, dated the 22nd day of October, 1921.

Dated New York October 29th 1921.

HENRY UTTA,
Solicitor for Petitioner.
HENRY C. WILLCOX,.
Solicitor for Respondent.

604 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings, whereof mention is within made, having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of error herein.

Dated, New York, November 3rd, 1921.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

605 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. American Mills Company v. American Surety Company. Return to Certiorari. 1.70. 405.

606 [Endorsed:] File No. 28,360. Supreme Court U. S., October Term 1921. Term No. 405. American Mills Co., Petitioner, vs. American Surety Co. of New York Writ of certiorari and return. Filed Nov. 5, 1921.

Office Supreme Court
FILED
JUL 9 19
JAMES D. MA

No. 405 118

IN THE

SUPREME COURT OF THE UNITED STATES

AMERICAN MILLS COMPANY,

Petitioner,

vs.

AMERICAN SURETY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF SAME.

HENRY UTTAL,
Solicitor for Petitioner,
32 Broadway,
New York City,
New York.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

AMERICAN MILLS COMPANY, a corporation organized under the laws of Georgia, Petitioner, vs. AMERICAN SURETY COMPANY, a corporation organized under the laws of New York, Respondent.	No.

Petition of The American Mills Company for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The American Mills Company, hereinafter referred to as the Petitioner, by Henry Uttal, its counsel, hereby prays for a writ of certiorari to

review the final judgment of the United States Circuit Court of Appeals for the Second Circuit, which affirmed the judgment of the District Court of the United States for the Southern District of New York, in favor of the American Surety Company of New York, hereinafter referred to as the Respondent.

This suit was one in equity for cancellation of an insurance bond on the ground of fraud (complaint p. 1) and was brought in March, 1919, by Respondent (the Surety) against Petitioner (the Obligee), in the Supreme Court of the State of New York, after the loss had occurred and after Petitioner had entered suit for the recovery of damages on the insurance bond in the Circuit Court of Cook County, Illinois, and the Superior Court of Fulton County, Georgia, to which actions Respondent pleaded as defenses the identical matters of fraud set up in its complaint herein. Because of diversity of citizenship, Petitioner removed this cause to the District Court of the United States for the Southern District of New York.

After removal Petitioner answered the complaint in accordance with Federal Equity Rules 29 and 30, as follows (answer p. 45):

(a) Denials of the essential allegations of the complaint.

(b) Defenses that Respondent had a plain, adequate and complete remedy at law in the actions pending in Illinois and Georgia.

(c) A counterclaim arising out of the transaction which was the subject-matter of this suit, said counterclaim being a pure legal demand for a money judgment on an insurance bond for the loss.

Petitioner also served and filed its written motion to dismiss the complaint upon the ground that Respondent had a plain, adequate and complete remedy at law (p. 31-40). Before the trial, Petitioner's motion to dismiss was heard, and on May 9th, 1919, the following order was entered thereon:

> "Ordered that defendant's said motion so to dismiss plaintiff's complaint be and the same hereby is denied without prejudice to such action as trial judge may deem advisable." (Page 44.)

Thereafter, and before the trial, Petitioner renewed its motion to dismiss the complaint, which motion, after hearing, was on July 3rd, 1919, again denied and an order entered thereon identical with the order upon the first motion made by Petitioner (p. 73 & 74). Upon this motion the Court rendered an opinion holding that the complaint stated a cause of action in equity (p. 70, et seq).

Thereafter, in November, 1919, the case came to trial, and in accordance with the opinion of the Court upon the motion to dismiss, proofs

were presented upon all of the issues raised by the pleadings, Respondent offering proofs to support the allegations of the complaint and Petitioner offering proofs to support its denials and its defenses in the answer. Upon hearing the proofs, the trial court stated that, being convinced a fraud had been committed, he wanted argument on the law question only (p. 388). This question was whether the District Court could exercise equity jurisdiction to cancel the insurance bond under the proofs submitted, which included Respondent's proof that the loss under the bond had occurred, that actions at law therefor were pending in Illinois and Georgia, and Petitioner's proofs that Respondent had a plain, adequate and complete remedy at law.

Argument was heard, and the court requested briefs. (pp. 388 to 396.)

Thereafter, a decree was entered by the District Court that the court had jurisdiction of the case in equity, and decreeing cancellation of the bond (p. 545). (The opinion of the court is printed in the record at p. 537, et seq.) This decree was affirmed by the United States Circuit Court of Appeals for the Second Circuit on the 25th day of April, 1921. (This latter opinion and decree are printed in the record at pages 581-598.)

The trial court found, and the Circuit Court of Appeals concurred in that finding, that the District Court of the United States sitting

in equity was without jurisdiction to entertain Respondent's complaint because Respondent had a plain, adequate and complete remedy at law, but held that Petitioner had, by pleading its counterclaim and introducing evidence in support thereof, waived the right to object to the jurisdiction of the court (pp. 541, 542 and 543.)

To summarize: Respondent sued, after the loss had occurred, in the Federal Court in Equity to cancel the insurance bond for fraud. Petitioner moved to dismiss the complaint because Respondent had an adequate remedy at law. Petitioner also answered the complaint defending on the ground that Respondent had an adequate remedy at law, and, under Federal Equity Rule 30, pleaded a counterclaim, for the loss under the bond, a pure legal demand, arising out of the transaction which is the subject-matter of the suit. The motion to dismiss was twice heard before the trial and was denied, without prejudice to such action as the trial judge might deem advisable, the Court holding that the complaint stated a cause of action in equity. Upon the trial, Petitioner offered proofs of its defenses and counterclaim, after Respondent had rested, and, at the close of the case, again argued the jurisdictional question.

The courts below held that defendant rightfully objected to the jurisdiction of the court but waived its objection by its pleading and proofs of its counterclaim.

QUESTIONS PRESENTED.

I.

The specific question raised by this application is:

Under the facts above stated, did defendant waive its objection to the jurisdiction of the United States District Court in Equity?

The question presents for examination the following supplementary questions:

(a) The construction of Federal Equity Rules 29 and 30, with particular reference to the second paragraph of Rule 30, and the application of these rules to the case at bar.

The importance of the questions herein presented is emphasized by reason of the construction which has been placed upon the second paragraph of Rule 30 by the Circuit Courts of Appeals of the Fourth, Sixth and Eighth Circuits (cases cited on appended brief) as opposed to the construction in the case at bar by the Circuit Court of Appeals for the Second Circuit, this being the first construction of such rule by the latter court so far as petitioner has been able to discover. Furthermore, there has been no construction of this rule by the United States Supreme Court to petitioner's knowledge.

(b) The consideration of these rules, together with Federal Equity Rules 22 and 23, as affected

by the Seventh Amendment of the Constitution of the United States.

The Court below has held that the second paragraph of Rule 30 is not mandatory because to give it such a construction would be violative of the Seventh Amendment of the Federal Constitution preserving the right to trial by jury.

The general doctrine of waiver of the defense of adequacy of legal remedy by defendant in a suit in equity is the underlying proposition in the case at bar. It has been held by the Courts below in this case that Respondent's complaint must have been dismissed by the trial court for want of jurisdiction, except for such waiver by Petitioner.

Your Petitioner presents herewith in accordance with the rules and practice, a transcript of the record in the said Circuit Court of Appeals and appends to this petition a short brief on the principal questions involved.

WHEREFORE your Petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Court, directed to the United States Court of Appeals for the Second Circuit, commanding the said Court to certify the above case to this Court, for review and determination, as provided by law, and that your Petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

HENRY UTTAL,
Counsel for Petitioner.

State of New York, }
County of New York, } ss.:

HENRY UTTAL, being duly sworn on oath, deposes and says that he is of counsel for the petitioner in the above entitled case; that he knows the contents of said petition and that the facts therein stated are true to the best of his knowledge and belief.

HENRY UTTAL,

Sworn to and subscribed to before me this
5th day of July, 1921.

A. PAUL LOSLIN,
Commissioner of Deeds,
City of New York.
Residing in Queens Co.

I hereby certify that I have examined and read the foregoing petition for a writ of certiorari, and that in my judgment such petition is well founded and should be granted by this Honorable Court, and that said petition is not filed for delay.

HENRY UTTAL,
Counsel for Petitioner.

New York, July 5, 1921.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

AMERICAN MILLS COMPANY, a corporation organized under the laws of Georgia, Petitioner, vs. AMERICAN SURETY COMPANY, a corporation organized under the laws of New York, Respondent.	No.

BRIEF.

Before proceeding to a discussion of the points raised upon this application, petitioner deems it important to cite to the court the following propositions of law which were recognized by the District Court and the Circuit Court of Appeals below:

(a) A court of equity will not, AFTER THE LOSS INSURED AGAINST HAS OCCURRED, and where there exists a pure legal demand in favor of the assured for money, cancel a policy

of insurance and enjoin proceedings at law thereon, merely upon the ground that the policy was procured through fraud practiced upon the insurer, SINCE SUCH DEFENSE IS FULLY AVAILABLE AT LAW.

Phoenix Mutual Life Ins. Co. vs. *Bailey,* 13 Wall., 616; 20 L. Ed., 501;

Bankers Reserve Life Co. vs. *Cheerson,* 43 L. R. A. (N. S.) page 265; containing a collation of cases on the subject;

Cable vs. *U. S. Life Ins. Co.,* 191 U. S., page 288, 48 L. Ed., page 188;

Buzard vs. *Houston,* 119 U. S., page 347, 30 L. Ed., page 451;

Manchester Fire Assur. Co. vs. *Stockton,* 38 Fed. Rep., page 378;

Riggs vs. *Union Life Ins. Co.,* 63 C. C. A., page 365, 129 Fed. Rep., page 207, (C. C. A., 8th Circuit), 194 U. S., page 637;

Home Insurance Co. vs. *Stanchfield,* 1 Dill, page 424, Fed. Cases, #6,6660;

Aetna Insurance vs. *Smith,* 73 Fed., page 318, 12 L. R. A., (N. S.), page 881, 48 id., page 265;

Scottish Union, etc. vs. *Bowland,* 196 U. S., 611, 48 L. Ed., 619;

General Film Co. vs. *Sampliner,* 252 Fed. Rep., page 448;

Bronson vs. *Cook,* 247 Fed. Rep., page 602;

Niagara Fire Insurance Co. vs. *Adams,* 198 Fed. Rep., page 822;
Ripp vs. *Babin,* 19 How., 271, 15 L. Ed., 633.

(b) A bond executed upon a consideration by a bond Company to secure the performance of a contract is a contract of insurance.

Citizens Trust & Guaranty Co. vs. *Globe & Rutgers Fire Ins. Co.,* (C. C. A., 4th Circuit), 229 Fed. Rep., 326;
Young vs. *American Bonding Co.,* 228 Penn., 373;
Lesher vs. *U. S. F. & D. Co.,* 239 Ill., 502;
Hornel & Co. vs. *American Bonding Co.,* 112 Min., 288, 33 L. R. A. (N. S.), 513 and cases cited in the note in 33 L. R. A. (N. S.), 513.

POINT I.

Petitioner did not waive its contention made in its motion to dismiss and in the defenses in its answer pursuant to Federal Equity Rule 29, that Respondent had a plain, adequate and complete remedy at law, by pleading under Equity Rule 30 and offering proof of its counterclaim for the loss under the insurance bond, which counterclaim was for a money judgment arising out of the transaction, the subject-matter of the suit.

The Federal Equity Rules promulgated by this Court at the October, 1912, Term (57 L. Ed. 1633, et seq.) provide as follows:

> "Rule 29—Defenses—How Presented.
>
> Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by de-

murrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered."

"Rule 30—Answer—Contents—Counterclaim.

The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaning the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic, or other person *non compos* and not un-

der guardianship, but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.

The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit, and may, without cross bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim so set up shall have the same effect as a cross suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross claims."

(a) As provided in Rule 29, petitioner filed its motion to dismiss on the ground that respondent had a plain, adequate and complete remedy at law (p. 31).

Upon two hearings of its motion to dismiss, the District Court denied the same without prejudice to such action as trial judge may deem advisable. Upon the second application, the Court held (p. 70) that the complaint herein set out a cause of action in equity. The orders of the District Court denying this motion are in accord with the Federal practice that a cause in equity should be fully heard before

the motion to dismiss for want of jurisdiction is finally passed upon.

Krauss vs. *Tanning Co.*, 249 Fed. Rep., 538;
Ralstone Steel Car Co. vs. *National Dump Car Co.*, 222 Fed. Rep., 590.

(b) Petitioner also served and filed its answer containing separate defenses to the complaint, as provided in Equity Rule 29, that respondent had a plain, adequate and complete remedy at law (pp. 51-54).

At the trial, petitioner introduced evidence in support of these defenses (Defendant's Exhibits "A", "B", "C" and "D", pages 462 to 536, being the certified records of the actions at law, pending on the bond herein; offered in evidence at pages 385, 386 and 387). *It will thus be seen that at the threshold of the case, twice before the trial and during the trial, petitioner insisted upon its defenses that respondent had a plain, adequate and complete remedy at law.*

(c) Petitioner also pleaded in its answer a counterclaim arising out of the transaction which is the subject matter of the suit. Respondent's complaint sought to cancel an insurance bond where the loss had occurred, upon the ground of fraud. Petitioner's counterclaim sought a judgment for the loss under the bond. Nothing could be more directly opposed to respondent's demand for the cancellation of the bond than petitioner's demand for judgment thereon.

The overwhelming weight of authority is that the counterclaim interposed herein is one "aris-

ing out of the transaction which is the subject matter of the suit."

Knupp vs. *Bell*, 243 Fed. Rep., 157;
Howard vs. *Leete*, 251 Fed. Rep., 918;
Caflisch vs. *Humble*, 251 Fed. Rep., 1;
Laska vs. *Harris*, 215 N. Y., 554;
Thomson vs. *Sanders*, 118 N. Y., 252;
Ter Kuile vs. *Maraland*, 31 N. Y. Supp., page 5, at page 8;
Deacon vs. *Weeks*, 73 N. Y. Supp., page 641;
Gross vs. *Hockstin*, 72 Misc., 343, 130 N. Y. Supp., 315, at page 319.

Since the counterclaim arose out of the transaction which was the subject matter of the suit, petitioner's pleading of same was in compliance with the first part of Paragraph 2 of Rule 30 which provides:

> "The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit * * *."

With the exception of the decision of the courts below in this case, the authorities are uniform that this portion of the rule is mandatory; that is to say, petitioner was compelled to plead its counterclaim for the money judgment on the instrument in question. It was not optional with petitioner to assert its counterclaim; had it not done so, it might have im-

periled its right to recover on the actions pending elsewhere.

In *Knupp* vs. *Bell,* (C .C. A., 4th Circuit), 243 Fed. Rep., 157, at page 161, the Court said:

> "We are also of the opinion that no error was committed in awarding judgment in favor of Wolcott & Kerr, on the unpaid notes which they had taken up and become owners of before this suit was brought. It appears plain to us that these notes constitute a counterclaim arising out of the transaction which is the subject matter of this suit in court, and Rule 30 * * * provides that such a counterclaim must be stated in the answer. Indeed, it may be doubted whether the defendants named would not have waived the right to recover on these notes if they had not set them up in answer to the plaintiff's bill. *Portland Wood Pipe Co.* vs. *Slick Bros.,* 222 Fed. Rep., page 528 and cases cited."

In *Caflish* vs. *Humble,* 251 Fed. Rep., 1, (C. C. A., 6th Circuit), the Court said:

> "Under the first clause of the second paragraph of equity rule 30 (198 Fed. XXVII, 115 C. C. A. XXVII) the defendant was required to set up its counterclaim or waive it. *Portland Wood Pipe Co.* vs. *Slick Bros. Const. Co.* (D. C.), 222 Fed. 528; *Electric Boat Co.* vs. *Lake Torpedo Co.* (D. C.), 215 Fed., 377, 380; *Marconi Wireless*

Telegraph Co. vs. *National E. S. Co.* (D. C.), 206 Fed., 295, 298. The necessary implication to be drawn from *Williams* vs. *Adler-Goldman Commission Co.*, 227 Fed. 374, 378, 142 C. C. A. 70 (C. C. A., 8), accords with the conclusion above reached."

In *Howard* vs. *Leete*, 257, Fed. Rep., 918 (C. C. A., 6th Circuit), the Court said:

"The cases of *Caflisch* vs. *Humble, supra,* and *Knupp* vs. *Bell* (C. C. A., 4), 243 Fed., 157, 156 C. C. A., 23, are in point. In the *Caflisch* case we held that the defendant's claim for damages for breach of a contract of purchase and sale of lumber, on account of which plaintiff was seeking to establish an equitable lien, was a counterclaim arising out of the transaction which was the subject-matter of the suit, and, indeed, one which the defendant was obliged to set up or waive. True, such demand for damages might be said to be germane to the accounting and so of an equitable nature, but the decision invoked the proposition that "whenever practicable to do so, a court of justice should do justice completely and not by halves" *Knupp* vs. *Bell,* however, is on all fours with the instant case. There, in a suit to rescind a contract for the purchase of land, judgment for defendants (the vendors) for the amount of the purchase-money notes (on denial of relief to plaintiff) was affirmed, as on a "counterclaim arising out

of the transaction which is the subject-matter of the suit"; doubt being also expressed whether defendants would not have waived such right of recovery, had it not been set up in the answer.

In the instant case we are not called upon to decide whether, in view of the word "must" in the first clause, as distinguished from the word "may" in the second clause, appellees by failing to ask judgment on the notes would have lost the right to sue upon them elsewhere, *after a decision in the equity suit denying appellant any relief;* for it is clear that the words "and such * * * counterclaim, so set up, shall have the some effect as a cross suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross claims", apply to "any counterclaim arising out of the transaction which is the subject-matter of the suit"; and we think that to deny appellees at least the absolute right to present in the equity suit their claim to affirmative relief would violate the spirit and intent of the rule, construed in the light of the policy disclosed by rules 22 and 23 (198 Fed. XXIV, 115 C. C. A. XXIV) as well as by recent legislation designed to simplify practice." (Italics ours.)

Electric Boat Co. vs. *Torpedo Lake Boat Co.*, 215 Fed. Rep., 377.

The purpose of the equity rules was to simplify the practice in the Federal Equity Courts.

Prior to the adoption of these rules, a Federal Court of Equity *having properly acquired jurisdiction of the subject matter,* ordinarily, would, for the purpose of putting an end to litigation, proceed to do final and complete justice between the parties even though this required it to determine purely legal rights that otherwise would not lie within the range of its authority, provided such relief could as well be given there as by a proceeding at law.

Howard vs. *Leete, supra,* citing *Tayloe* vs. *Insurance Co.,* 9 How., 390, 13 L. Ed., 187;
Ames vs. *Ins. Co.,* 94 U. S., 621, 24 L. Ed., 298;
Camp vs. *Boyd,* 229 U. S., 530, 57 L. Ed., 1317.

Under the old practice, counterclaims were presented by cross bills. The filing of such cross bill praying for affirmative relief was permissive and therefore a waiver of any objection to the jurisdiction of a court of equity over the subject matter of the suit. (*Original Consolidated Mining Co.* vs. *Abbott,* 167 Fed. Rep., 681, used as a basis of the decision of the trial court in this case.) This permissive practice was a voluntary submission to a court of equity, an abandonment of the right of trial by jury.

The plain intent of the first part of the second paragraph of Rule 30 is to *compel* a defendant to plead all counterclaims (legal or equitable) arising out of the transaction which is the sub-

ject matter of the suit. Such compulsory pleading cannot amount to the abandonment of the right of trial by jury, for by Equity Rule 22, if, at any time, it appear that the suit (counterclaim) should have been brought as an action on the law side of the court, it must be forthwith transferred and tried as an action at law. There is no counterpart to Rule 22 in the former equity practice.

Rule 30 does not give, nor was it intended to give, jurisdiction to an equity court, in conflict with Section 267 of the Judicial Code, (Rev. St., §723, Act of March 3, 1911, Ch. 231, p. 267; 36 Stat. L. 1163) which provides that suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law, the statute which preserves to litigants the right of trial by jury in matters of law. *Rule* 30 *governs the pleadings only.* Whether or not the counterclaim shall be determined by the equity or law court is governed by Rule 22:

> "If, any time, it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential,"

or Rule 23:

> "If, in a suit in equity, a matter ordinarily determinable at law arises, such mat-

> ter shall be determined in that suit, according to the principles applicable, without sending the case or question to the law side of the court,"

which point out the forum after jurisdiction has been determined.

The Circuit Court of Appeals for the Second Circuit in its decision in this case states that Rule 30 was never intended to compel a defendant to plead a purely legal cause of action as a counterclaim to a suit in equity, and that such construction would be violative of the Seventh Amendment of the Federal Constitution, and further, that petitioner, in pleading its counterclaim, did so voluntarily. This ignores the construction placed upon Rule 30 by the other Circuit Courts of Appeals, the use of the word "must" in the first part of the second paragraph of Rule 30, and the word "may" in the second part of the same paragraph, and the force and effect to be given to Rules 22 and 23.

If the Court had jurisdiction of respondent's complaint, then, under the practice prior to the adoption of the equity rules and since then, it would have retained jurisdiction to decide petitioner's counterclaim, and, under the present practice, would function under Rule 23. On the other hand, if respondent's complaint had been dismissed by the District Court for want of jurisdiction, petitioner's counterclaim must have been transferred to the law side of the court for trial under Rule 22. In neither case is the

Seventh Amendment of the Federal Constitution violated, for in the one, the Court, following the settled rule that a court of equity having jurisdiction does nothing by halves, decides the entire controversy, and this has never been held to have impaired the right of trial by jury; while, in the other, if the jurisdiction of the subject matter is originally lacking, the right of trial by jury on legal demands is preserved by a transfer of such demands to the law side of the court, the complaint having been dismissed by the equity court for lack of jurisdiction.

American Falls Milling Co. vs. *Standard Brokerage Co.*, (C. C. A., 8th Circuit), 248 Fed. Rep., 487;
Linden Inv. Co. vs. *Honstain Bros. Co.*, (C. C. A, 8th Circuit), 221 Fed. Rep., 178.

In the cases of *Knupp* vs. *Bell, supra; Caflisch* vs. *Humble, supra,* and *Howard* vs. *Leete, supra,* the District Court, sitting as a Court of Equity, had jurisdiction of the original bill. There was no contention that the filing and proof of the counterclaim by the defendant gave the court its right to exercise its jurisdiction in equity, but, having jurisdiction in equity of the original bill, the court proceeded, under Rule 23, to decide the legal issues of the counterclaim and, as, stated in *Howard* vs. *Leete, supra,* this is but a continuation of a practice which prevailed in the Federal Courts prior to the adoption of Rule 30.

As has been shown, the pleading of the counterclaim in the case at bar, a pure legal demand arising out of the transaction which was the subject matter of the suit, was mandatory under the first part of the second paragraph of Rule 30, and such pleading, being mandatory, could not, nor was it intended under Rule 30, to confer upon the court jurisdiction prohibited by Section 267 of the Judicial Code. It has further been shown that this construction of Equity Rule 30, in the light of Equity Rules 22 and 23 does not violate the Seventh Amendment of the Federal Constitution. Pleading the counterclaim could, therefore, be no waiver of the defenses in the answer and in the motion to dismiss invoking Section 267, Judicial Code.

In the case at bar, because of this Section of the Judicial Code, the District Court was without jurisdiction to entertain respondent's complaint in a suit in equity. Petitioner so contended at the threshold of the case, twice before trial, and during the trial. No case can be found holding this contention waived when asserted as in the case at bar.

Such an objection once raised stands as a bar to the consideration of the cause until it has been withdrawn by the party asserting it. The record in this case is barren of any suggestion of a positive, active withdrawal by petitioner, and there is no suggestion in the record from which the conclusion can be drawn that the petitioner intended to abandon its objection to the jurisdiction of the court.

In *Singer Sewing Machine Co.* vs. *Benedict*, 229 U. S., 481, at page 484, it is said:

"In the Courts of the United States it is a guiding rule that a bill in equity does not lie in any case where a plain, adequate and complete remedy may be had at law. The Statutes so declare (Rev. Stat., Sec. 723), and the decisions enforcing it are without number. If it be quite obvious that there is such a remedy it is the duty of the Court to interpose the objection *sua sponte* and in other cases it is treated as waived if not presented by the defendant *in limine* (Citing cases). There was no waiver here. The objection was made by demurrer and again by the answer, and so, if it was well grounded, it was as available to the defendants in the Circuit Court of Appeals, to prevent a decree against them there, as it was in the Circuit Court (Citing cases)."

Boise Art. W. Co. vs. *Boise City,* 213 U. S., 276, page 281;
Wehrman vs. *Conklin,* 155 U. S., 314, page 323;
Harkness vs. *Hyde,* 98 U. S., 476, at page 479;
Hitchman Coal Co. vs. *Michell,* 243 U. S., page 229, at page 234;
Brown vs. *Lake Superior Iron Co.,* 134 U. S., 530, at page 535 and 536;
N. Y. Guaranty Co. vs. *Memphis Water Co.,* 107 U. S., page 205, at 214;
Foster Melburn Co. vs. *Chinn,* 202 Fed. Rep., page 175, at page 177.

The court below cited the case of *Merchants Heat & Light Co.* vs. *Clow & Sons,* 204 U. S., 286, in support of its decision.

This case is distinguishable from the case at bar for the following reasons:

1. The suit was one at law where the Federal equity rules, controlling in the case at bar, had no application.

2. Defendant's objection was to the jurisdiction of the persons and not of the subject matter, as in the case at bar.

3. The filing of the counterclaim was permissive and not mandatory.

The court below also cited the case of *McGowan* vs. *Parish,* 237 U. S., 285.

An examination of this case discloses that defendant did not set up the defense by motion to dismiss or in the answer that plaintiff had an adequate remedy at law, but instead by a consent decree invoked the jurisdiction of the court. Mr. Justice Pitney said that the consent decree amounted to a clear and express waiver of the jurisdictional objection.

In *Southern Pac. R. R.* vs. *U. S.,* 200 U. S., 341, cited by the court below, Mr Justice Brewer, writing for the court, said no objection was made to the jurisdiction of the court by any pleading or before the hearing.

An examination of the other cases cited by the court below in its opinion shows the facts and principles in those cases have no application to the case at bar.

(d) The courts below held that petitioner, in place of renewing at the commencement of the trial, its motion to dismiss, proceeded with the trial and offered proof of its counterclaim and asked for judgment. Upon the second hearing of its motion to dismiss, the court ruled that respondent's complaint set out a cause of action in equity (p. 70) and denied the motion without prejudice to such action as trial judge may deem advisable (p. 74). Upon this hearing of the motion to dismiss, the Court had before it Respondent's complaint, Petitioner's answer, and Respondent's reply thereto.

This motion to dismiss, under the repeated rulings of this court, admitted the allegations of the complaint.

What, then, would have been the purpose of renewing this motion upon the trial before proofs were in?

Not at the beginning of the trial before proofs were offered, for the trial court had nothing more before it at that time than did the court upon the motion; not at the conclusion of respondent's proofs, because there was no variance between respondent's proofs and the allegations of the complaint which were admitted upon motion.

It follows, therefore, that petitioner had no alternative but to present proofs in support of its answer. This it did, presenting as part of its proofs, evidence to support the defenses attacking the jurisdiction of the court and other proofs which the courts below held were offered in support of the counterclaim. Then,

after the proofs were all in, petitioner renewed its contention that the court did not have jurisdiction of the subject matter.

The ruling of the court upon the motion before trial, and petitioner's procedure thereafter, is in accordance with the established Federal practice.

Krauss vs. *Tanning Co.*, 248 Fed. Rep., 538.

In *Ralstone* vs. *National Dump Car Co.*, 222 Fed. Rep., page 590, the defendant moved to dismiss complainant's bill in equity upon the ground, among others, that plaintiff had an adequate and complete remedy at law. Upon hearing this motion, the Court said:

> "Under our practice the Federal Courts are inclined to allow a case in equity involving important matters to go to issue and proofs where a doubtful question is raised by the pleadings. It has been the established practice to overrule a demurrer unless it is founded upon an absolutely clear proposition that, taking the allegations to be true, the bill must be dismissed at the hearing".

Petitioner could not present its proofs piecemeal; it could not, after it had presented proofs sustaining its defenses attacking the jurisdiction, argue the motion to dismiss without abandoning the remainder of its proofs. It was obliged to complete its proofs to sustain the

answer in full, and then, after having rested, renew its contention that the court was without jurisdiction to proceed in the case. That petitioner did this is borne out by the record (pp. 388 to 395).

In view of the statement in the opinion of the court below, that "when it observed that judgment on the facts was going against it, then for the first time during the course of the trial, it insisted that the appellee had an adequate remedy at law," attention is directed to the record (pages 385, 386 and 387, Defendant's Exhibits "A", "B", "C" and "D", pages 462 to 536), showing the petitioner offered its evidence in support of its defenses attacking the jurisdiction of the court as a part of its proofs, and prior to the intimation by the trial court that he would find the facts against petitioner (p. 388).

(e) Petitioner has been unable to find any interpretation of Equity Rules 22, 23, 29 and 30 by this Court. In view of the difference in interpretation of Rule 30 as disclosed in this brief, it is respectfully submitted that the questions herein presented are of sufficient general importance to warrant review and determination by this court.

Respectfully submitted,

HENRY UTTAL,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

AMERICAN MILLS COMPANY, a Georgia Corporation, Petitioner, vs. AMERICAN SURETY COMPANY OF NEW YORK, a New York Corporation, Respondent.	No. 405.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* TO CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement.

This is an application by American Mills Company, an unsuccessful defendant, for a writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit.

Respondent (plaintiff below) sued in equity to

cancel a bond for $22,100., executed by it as surety to petitioner as obligee, on the ground that its execution was procured by a gross fraud in which petitioner participated. The fraud was fully established, the trial court declaring:—"There was a cold blooded fraud perpetrated upon the surety company; that is too plain for argument; I have not any doubt whatever about that" (p. 388, fol. 1147).

The Circuit Court of Appeals unanimously approved this finding by the trial court, declaring that the obtaining of the bond, "was a fraud attempted to be perpetrated to secure payment to the appellant" (defendant below and present petitioner, p. 589, fol. 1765).

Petitioner claims, however, as the basis of this application, that the trial court in equity was without jurisdiction of the suit.

The facts as to jurisdiction are as follows:—

As a result of the fraud referred to, respondent Surety Company executed its bond guaranteeing the performance by Hartenfeld Bag Co. of a pretended contract between it and petitioner, American Mills Co., calling for the delivery by the Bag Company to the Mills Company of merchandise priced at $22,100. within 75 days, or the payment of $22,100. by the Bag Company to the Mills Company, which sum the parties to such contract falsely represented had been paid by the Mills Company to the Bag Company as an advance payment for such merchandise. The Bag Company did not deliver the goods or pay the money.

As soon as the seventy-five days had expired, the Mills Company at once brought suit at law in the

Illinois State Courts upon the bond against the Surety Company and the Bag Company and caused process to be served on both defendants (pp. 489, 523 to 536). A few days later it also brought suit at law in the Georgia State Courts upon the same cause of action against the same defendants. Process was served on the Surety Company but could not be served on the Bag Company by reason of its absence from Georgia (pp. 462 to 521).

Before answering in either of such suits, the Surety Company brought this suit against the Mills Company, the present petitioner, in the New York Supreme Court alleging the facts constituting the fraud and asking for the cancellation and surrender of the bond. Defendant removed the action to the United States District Court by reason of diversity of citizenship and then answered denying the fraud and the material allegations of plaintiff's cause of action, including the averment that plaintiff had no adequate remedy at law (pp. 45 to 51).

Defendant further pleaded in this action:

(1) The pendency of the suit in Illinois and that this plaintiff had set-up by way of defense the same fraud which constitutes the basis of this suit (pp. 51, 52).

(2) The pendency of the suit in Georgia and that this plaintiff had set up by way of defense the same fraud which constitutes the basis of this suit (p. 53).

(3) A *counterclaim* in which defendant set up a complete cause of action *at law* against plaintiff on the bond sought to be cancelled, claiming damages for breach thereof for the sum of $21,050, the same sum claimed by defendant in its suits in Illinois and Georgia (pp. 54 to 57).

Defendant concluded its answer in the suit at bar with the following prayer:

> "Wherefore defendant demands judgment dismissing the complaint with costs; *and for affirmative judgment against the plaintiff, on defendant's counterclaim, for the sum of Twenty-one thousand and fifty dollars ($21,050.00) with interest* thereon from the 14th day of December, 1918, with costs" (fol. 168).

Plaintiff filed a reply denying the material allegations of the counterclaim and pleading as a defense thereto:

(1) The same fraud which is the basis of the demand for equitable relief in the complaint;

(2) Defect of parties (pp. 60 to 67).

Defendant then moved on the pleadings and on affidavits for a dismissal of the *complaint* merely, on the ground that plaintiff had an adequate remedy at law and was not entitled to equitable relief (fols. 93-107). The United States District Court denied the application "without prejudice to such action as trial judge may deem advisable" (fol. 132).

Plaintiff then moved for a final decree on the pleadings, on the ground that the admissions in defendant's answer entitled plaintiff to the relief sought (fols. 206, 207). In opposing this application defendant's counsel renewed his application for dismissal of the complaint on the ground that equity had no jurisdiction because plaintiff had an adequate remedy at law. Again the District Court denied the motion without prejudice (fol. 211 and fol. 220, top p. 74), saying (fol. 210):

> "I pointed out that under the present practice, if the cause seemed to be at law instead of in equity, the procedure was not to dismiss but to transfer the cause to the law side".

After these preliminary proceedings the parties went to trial. *Defendant did not at any time on the trial renew its motion to dismiss because plaintiff had an adequate remedy at law, nor in any way seek to raise this issue until after the Court had announced its decision on the merits.*

On the contrary, at the close of plaintiff's case (fol. 1098, p. 366), defendant called defendant's president to the stand and introduced the alleged contract between the Bag Co. and the Mills Co., the bond of the Surety Co. guaranteeing performance of such contract, evidence of default by the Bag Co. and a demand that the Surety Co. pay the amount ostensibly due on the bond. Such proof could only have been offered to establish the common law cause of action pleaded in the counterclaim. Such evidence was utterly irrelevant as a defense to plaintiff's suit to cancel the bond. Defendant then rested without at any time raising at the trial any objection that plaintiff had an adequate remedy at law (p. 388). Defendant did not ask at any time, that the issues raised by the counterclaim and reply be sent to a jury for trial.

The court then announced that it would decide for the plaintiff on the facts and that the only question on which it would hear argument was the law (p. 388). Defendant then for the first time at the trial urged that plaintiff had an adequate remedy at law by way of defense to any suit at law on the bond and that consequently plaintiff failed to prove any cause of action in equity. Plaintiff's counsel in reply called the court's attention to the fact that defendant had waived such objection by pleading the counterclaim and asking for affirmative relief. Defendant then for the first time asked leave to withdraw its counterclaim, which application

was denied and exception taken by defendant thereto (p. 395). Plaintiff then asked leave to withdraw its second defense in the reply. The court permitted this withdrawal and defendant excepted (p. 395). Subsequently the court rendered its formal opinion finding that the bond in question was procured by a fraud to which defendant was privy and that the bond should be cancelled if the court has jurisdiction to do so (fol. 1623, p. 541); that, if the defendant had stood squarely on the objection of the lack of equitable jurisdiction, the court would have had to dismiss the plaintiff's suit; that the defendant could waive the objection in a case such as this where equity originally had jurisdiction and that defendant had done so by:

(1) Pleading the counterclaim;

(2) Offering evidence at the trial solely directed to the proof of the cause of action alleged in the counterclaim and utterly irrelevant to any other issue presented by the pleadings.

(3) Failing to renew at the trial any objection to the jurisdiction of the court until after both sides had rested and the court had announced his decision on the question of fact (pp. 541 to 544).

The court rendered a decree determining that the court had jurisdiction; that plaintiff was entitled to the surrender and cancellation of the bond and that defendant's counterclaim should be dismissed on the merits (pp. 545 to 547).

From this decision and decree defendant appealed.

The Circuit Court of Appeals affirmed the decree appealed from, declaring that, unless the Mills

Company had waived the objection to the jurisdiction of the court of equity, such court could not have exercised jurisdiction (fol. 1772), that such objection could be waived (fol. 1772); that pleading the counterclaim, and insisting upon it at the trial by offering evidence solely to establish it, constituted such a waiver (fol. 1772), that Equity Rule XXX did not compel the Mills Company to plead or prove the counterclaim and that a construction of such rule so as to compel such pleading and proof of a purely legal cause of action would cause Rule XXX to violate the Seventh Amendment to the Constitution and make it void (fol. 1784); that the pleading and proof of the counterclaim was voluntary (fol. 1785), and that, even if the trial court had dismissed the plaintiff's cause of action at the close of the trial for lack of jurisdiction, such a ruling would have still left the counterclaim and reply undisposed of (fol. 1786); and, since defendant had not sought to withdraw the counterclaim until a decision had been rendered by the court on the merits thereof or have it sent to the law side for trial, defendant thereby waived any right to a jury trial on the counterclaim and reply, regardless of the fate of the cause of action alleged in the complaint (fols. 1786-1787).

Respondent respectfully asks that the petition for writ of *certiorari* be denied for the following reasons:

POINT I.

Petitioner (defendant below) herein waived any objection to the jurisdiction of the court in equity to try and dispose of this suit by pleading the counterclaim on the bond which plaintiff sought to cancel.

The rule of law is settled that when one becomes an actor, or litigant seeking affirmative relief, before a court having jurisdiction of the general subject matter under litigation, he waives all objections to the jurisdiction of the court. It is equally well settled that a defendant who pleads a counterclaim becomes such an actor and is estopped to deny the jurisdiction of the forum in which he has sought relief.

Merchants Heat & Light Co. *vs.* Clow, 204 U. S. 286, 51 L. Ed. 488.

There defendant challenged the validity of the service of process on it, a foreign corporation, and in addition to its answer or plea, set up a claim for affirmative judgment. The Court said, page 289:

> "But by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action, and, by invoking submitted to it." * * *

and further at page 290:

> "There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in the proper sense he submits. De Lima *vs.* Bidwell, 182 U. S. 1,

174; 45 L. Ed. 1041, 1047, 2 Sup. Ct. R. 743; Fisher *vs.* Shropshire, 147 U. S. 133, 145; 37 L. Ed. 109, 115; 13 Sup. Ct. R. 201; Farmer *vs.* Nat. Life Assn., 138 N. Y. 265, 270; 33 N. E. 1075. As we have said, there is no question at the present day that, by an answer in recoupment, the defendant makes himself an actor and, to the extent of his claim, a cross plaintiff in the suit."

Petitioner admits in substance (Pet. Brief, p. 20, 2nd par.) that prior to the New Equity Rules, its pleading of this counterclaim would have been a complete waiver of the objection to equity jurisdiction. It now claims that the pleading of the counterclaim was not a waiver because such pleading was not voluntary but was done under compulsion of Rule XXX of the New Equity Rules. The material portion of that rule is as follows:

> "The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit and may, without cross bill, set out any set off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set off or counterclaim so set up shall have the same effect as a cross suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross claims."

While it is true that the words above quoted declare that the answer *must* state *any* counterclaim arising out of the transaction which is the subject of the suit, such language must be construed in connection with the following words of the Seventh Amendment to the Federal Constitution:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

Neither Congress, nor the courts have any power to *compel* a defendant to submit his purely legal cause of action for trial as a counterclaim to a suit in equity, especially where the proof of such legal cause of action is obviously and concededly in no way essential to a decision of plaintiff's case or defendant's defense thereto. It is not to be assumed that the Supreme Court in promulgating Rule XXX had any such intention. Still less is it to be assumed that the Supreme Court intended to require a defendant, who claims that a court of equity has no jurisdiction of plaintiff's cause of action, to try a purely legal cause of action as a counterclaim thereto.

It is therefore respectfully submitted that, either:

(*a*) Rule XXX is not compulsory, but merely permissive, or that

(*b*) Rule XXX, if it compels the pleading of a legal counterclaim, is unconstitutional, or that

(*c*) Rule XXX is compulsory but *applies to pleading only* and that a defendant is entitled, *upon seasonable demand,* to have the counterclaim thus pleaded sent to the law side for a jury trial.

Petitioner in its brief concedes in substance that this last construction is the only one under which Rule XXX can be sustained.

If Rule XXX be construed as permissive and not compulsory, or, if Rule XXX be construed as unconstitutional, then the pleading of the counterclaim was voluntary and a waiver of objection to the jurisdiction of the court.

If Rule XXX be construed as compulsory only as to *pleading* and as permitting a defendant to

ask for a jury trial of the issues raised by the legal counterclaim and the reply thereto (as petitioner now contends), then the failure to seasonably demand a jury trial of such issues and the trial thereof without objection before the court was a waiver of the right to a trial by jury and of the question of equitable jurisdiction.

The fact that defendant proved its counterclaim without protest or objection and did not ask a jury trial thereof are undisputed. The authorities establishing that one who tries his case before the court without objection waives all right to a jury trial are quoted in POINT II of the brief at page 13.

There is another aspect of this question, however, which also shows that defendant's act in pleading this counterclaim was voluntary. Giving the words of the rule all possible literal force, how could defendant have been injured or prejudiced by failing to plead this counterclaim? There is no penalty provided in the rule itself and it could only be claimed that defendant might be prejudiced in some other suit or proceeding instituted by it to recover on the bond. An examination of the facts in this case, however, shows at once that no such prejudice could arise. If the Mills Company had not pleaded the counterclaim and had relied on its claim that the court had no jurisdiction and that claim had been sustained, its failure to plead the counterclaim could not possibly have affected its right to subsequently recover elsewhere on the cause of action embraced in such counterclaim. If the court, on the other hand, held that it had jurisdiction of the suit for cancellation and decided the question on the merits in favor of the Mills Company such decision could not have prejudiced the Mills Company in its right to recover at law on either of the suits

which had previously been begun in Illinois and Georgia. Similarly, if in the absence of any counterclaim being pleaded, the court held that it had equitable jurisdiction of the suit for cancellation and decided the question of such right of cancellation on the merits in favor of the Surety, such decision might be conclusive on the Mills Company's cause of action on the bond; but such result would be the same whether a counterclaim was pleaded or not. It will thus be seen that defendant's claim that it might be prejudiced in subsequently prosecuting its two suits then already pending in Illinois and Georgia if it had failed to plead this counterclaim is without foundation.

POINT II.

The voluntary proof of the legal cause of action pleaded in the counterclaim, unaccompanied by any objection or protest, was a waiver of all objections to the trial before the Court of all matters involved in the suit.

Assuming for the sake of argument that the mere *pleading* of the counterclaim is not a waiver of the objection to the jurisdiction of the court because:

(1) It was accompanied by pleas or defenses setting up the objection to the jurisdiction and (or)

(2) Rule XXX requires the *pleading* of such counterclaim, allowing the defendant the right to

seasonably demand the trial thereof on the law side of the court,

no rule of law or court has been cited or suggested requiring defendant to *try* the issues raised by such counterclaim and reply in equity or to abstain on such trial from objecting to the jurisdiction. Any such rule would be clearly unconstitutional. Assuming that defendant was compelled to *plead* its counterclaim in equity, it could not be compelled to *try* it there.

Granting petitioner's present contention that Rule XXX is constitutional and compulsory because defendant has the right to a jury trial under Rule XXII, *if defendant seasonably seeks it,* the fact is undisputed that defendant never asked that the counterclaim be sent to a jury but instead voluntarily proved such counterclaim before the court in equity.

By failing to raise any objection on the trial, by voluntarily proving the cause of action embraced in the counterclaim and by not demanding a transfer to the law side or a jury trial, defendant waived any right to have the issues raised by the counterclaim and reply tried by a jury. A defendant cannot raise such an objection after it has submitted to a trial without a jury and the issue of fact has been decided against it.

Where a party is present in person or by counsel and goes to trial before the court without objection or exception, he voluntarily waives his right to a jury. Kearney *vs.* Case, 12 Wall. 275 (20 L. Ed. 395). In this case the Supreme Court held that the language of the Act of Congress of 1865 regulating the waiver of trials by jury in the Federal courts was not exclusive and that the parties might and did waive a jury trial by proceeding to

trial before the court without protest or objection.

The decision was quoted with approval in Perego *vs.* Dodge, 163 U. S. 166 (41 L. Ed. 118); Edwards Co. *vs.* La Dow, 230 Fed. (C. C. A.) 378, at 380. In the case at bar defendant's president was present and testified and defendant was represented by two counsel on the trial.

No explanation is offered why defendant did not seek to have the counterclaim transferred or why it proved the counterclaim without protest or objection. In so proving its case defendant acted voluntarily and elected to seek its relief in equity.

Aside from any rule, however, *it is obvious that the two claims, one of lack of jurisdiction and the other for affirmative judgment on the bond, are inconsistent and at some stage of the proceedings the defendant must elect on which claim it will stand.* It must at some point decide whether it will press the objection to jurisdiction or seek to recover on the counterclaim. It cannot do both. Even though a defendant may file inconsistent pleas, he must elect when he comes to trial and cannot then both run with the hare and hunt with the hounds. In the case at bar by its conduct on the trial defendant did so elect and abandoned all objections to the jurisdiction of the court. Although the court on both motions made before the trial had (properly or otherwise) reserved to the defendant the privilege of renewing on the trial its objection to lack of jurisdiction, defendant wholly failed to avail itself of any such privilege.

At the opening of the trial no objection was made by defendant to the jurisdiction of the court (p. 75). At the close of plaintiff's case no objection was taken nor motion made to dismiss for lack of proof of equitable jurisdiction (p. 366). At the close of the whole case no objection was made by

defendant and no motion was made on the ground of lack of jurisdiction (p. 388).

In addition, after plaintiff rested, defendant proceeded to prove the counterclaim on which it asked for judgment for $21,050. and interest. Defendant did not ask that such counterclaim be sent to a jury for trial. Defendant offered all the evidence necessary to make out a complete cause of action at law for recovery on the bond.

It is not pretended that this evidence had any bearing whatever on the merits of the plaintiff's cause of action that the bond had been procured by fraud or in any way tended to defeat plaintiff's cause of action. It was offered for one purpose alone, *i. e.*, to secure a recovery on the counterclaim. It was totally irrelevant to every other issue raised by the pleadings. The voluntary offering of such evidence by defendant, taken in connection with the fact that defendant voluntarily refrained from renewing its objection to equitable jurisdiction and did not seek a jury trial on the counterclaim (as, perhaps, it might have done under Rule XXX, if that rule is compulsory) conclusively establishes that defendant voluntarily waived all objection to the jurisdiction of the court of equity and elected to have the issues determined on the merits then and there.

> "An election of remedies takes place when a choice is exercised between remedies which proceed upon irreconcilable claims of right. When an election is made between such claims, with full knowledge of all the facts, an action may not thereafter be maintained upon the inconsistent claim."
>
> American Woolen Co. *vs.* Samuelsohn, 226 N. Y. 61 at 66.
>
> Robb *vs.* Vos, 155 U. S. 13, 39 L. Ed. 52.
>
> A. Klipstein Co. *vs.* Grant, 141 F. R. 72.

In Thompson *vs.* Howard, 31 Mich. 309 at 312, the Court said:

> "A man may not take contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with the knowledge or means of knowledge, of such facts as would authorize a resort to each, will preclude him from thereafter going back and electing again."

In Rodermund *vs.* Clark, 46 N. Y. 354, the court said:

> "Where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers and adopts. The remedies are not concurrent, and the choice between them being once made, the right to follow the other is gone forever (Morris *vs.* Rexford, 18 N. Y. 552). Any decisive act of the party, with knowledge of his rights and of the facts, determines his election in the case of conflicting and inconsistent remedies. Sanger *vs.* Wood, 9 Johns. Cas. 416, Littlefield *vs.* Brown, 1 Wend. 398, aff'd. Ct. of Errors, 11 *id.* 469-470."

In an attempt to show that defendant did not abandon on the trial its objection to the jurisdiction, petitioner claims at page 15 of its brief that defendant offered the records in the Illinois and Georgia suits and that such records could only have been offered and received in support of defendant's claim that plaintiff had an adequate remedy at law therein.

The only effect of such evidence was to prove that there were suits pending in Illinois and Georgia in which similar issues had been raised. The pend-

ency of the suits in the State courts, and the adequacy or inadequacy of the remedies, either legal or equitable, afforded therein did not have and could not have the slightest effect upon the equitable jurisdiction of the United States District Court. The pendency of a suit in a State court is no defense to a suit in the Federal courts on the same cause of action, and the jurisdiction of the Federal courts in equity is wholly independent of what remedies the State courts afford. The pendency of these actions consequently could not possibly affect the question of whether this suit should be dismissed because of adequacy of legal remedy and the receipt in evidence of the records in the State courts could not raise the question.

POINT III.

The voluntary proof of the legal cause of action pleaded in the counterclaim, unaccompanied by any objection or protest, was a consent that the issues presented by the counterclaim and reply be tried without a jury, regardless of the disposition of plaintiff's bill.

Wholly aside from the question of whether defendant by pleading and proving the counterclaim waived its objection to the jurisdiction of the court over *plaintiff's cause of action to cancel the bond*, it is clear that defendant by *proving* the counterclaim, waived all objection to the trial by the court without a jury of the issues raised by the counterclaim and reply.

Assuming, despite the pleading and proof of the counterclaim, that the court had dismissed plaintiff's cause of action because of an adequate remedy at law, such decision would have left the counterclaim and reply undisposed of. In the case at bar, defendant did not move for a dismissal at the close of plaintiff's case, never asked to withdraw its counterclaim until a decision had been announced on the merits, did not ask that the counterclaim and reply be sent to the law side for trial, and voluntarily proceeded to prove its cause of action on the bond.

It is submitted that such a course was a waiver of all objections to the jurisdiction of the court over the counterclaim and reply, regardless of the fate of the plaintiff's bill.

The counterclaim pleaded a complete legal cause of action. The reply specifically pleads, as a defense thereto, the same fraud in procuring the bond which is alleged in the complaint (fols. 183 to 197). Here then was a complete issue to be disposed of regardless of the disposition of the complaint. The trial court in its decree expressly dismissed such counterclaim on the merits (fol. 1638), thereby deciding that defendant was not entitled to recover on the bond.

In Knupp *v.* Bell, 243 Fed. (C. C.A.) 157, (quoted by petitioner with approval), the plaintiff sued in equity and defendant, under Equity Rule XXX, pleaded a counterclaim at law arising out of the same transaction. *Plaintiff's bill was dismissed for failure to prove a cause of action, but the Circuit Court of Appeals declared that the trial court retained jurisdiction over the counterclaim and that affirmative judgment in favor of defendant upon this purely legal demand was*

proper. If the trial court could render judgment under these circumstances on the merits in favor of the defendant on the legal counterclaim after dismissing the bill for lack of proof, it could equally have rendered judgment on the merits of the counterclaim in the plaintiff's favor if the facts had warranted such a disposition.

Upon this principle it seems clear in the present case that, if the trial court had held that plaintiff failed to prove a cause of action in equity because it failed to establish lack of legal remedy, such court would have still retained jurisdiction of the counterclaim and could have decided it on the merits against defendant and in favor of plaintiff.

Assuming that defendant had (as petitioner contends) the right to a jury trial of this issue, the fact remains that defendant did not ask for such jury trial and waived its right thereto by voluntarily proving its cause of action before the court, despite the previous warning of Judge Mayer, who said (fol. 210):

> "I pointed out that under the present practice, if the cause seemed to be at law instead of in equity, the procedure was not to dismiss but to transfer the cause to the law side."

It is obvious that defendant voluntarily elected to try its counterclaim in equity and that if the decision of the trial court had been in favor of the defendant on the facts and had awarded it judgment on the counterclaim, no objection to the jurisdiction of the court would ever have been raised.

POINT IV.

There is no original question of importance presented by this petition.

Assuming that Rule XXX is constitutional and compulsory because it applies only to the *pleading* of legal counterclaims, leaving to a defendant the right to seasonably demand that such counterclaim be sent to the law side for trial under Rule XXII, the facts are undisputed that defendant did not seek to have such counterclaim so transferred but proved it without compulsion, objection or exception; while the law is clearly settled by the decisions of this court that a party, who, without objection, tries his legal cause of action before the court, waives all right to a jury trial.

The petition for writ of *certiorari* should be denied.

Respectfully submitted,

HENRY C. WILLCOX,
Counsel of Respondent.

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*We have omitted from this list the great number of cases contained in the footnote at page 18 *et seq.*, where the divergent authorities are collated.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922: No. 118

AMERICAN MILLS COMPANY, *Petitioner,*

vs.

AMERICAN SURETY COMPANY OF NEW YORK, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE AMERICAN SURETY COMPANY.

This case involves two principal questions:

First: Did the American Mills Company, by first filing an answer and counterclaim *praying for affirmative relief* and going to trial thereon, waive the objection that the plaintiff had an adequate remedy at law?

Second: If so, was the decision of the District Court and of the Circuit Court of Appeals on the merits, that the American Mills Company had perpetrated "a cold blooded fraud" on the American Surety Company a correct one?

The answer to the first question depends upon the proper interpretation of Equity Rule 30, read in the light of the Seventh Amendment, and of the doctrine of waiver (pp. 13-17, *infra*).

The answer to the second question will be easy in view of the Petitioner's failure to brief it and of the findings of the District Court and the Circuit Court of Appeals (273 F. R. 67) regarding the fraud (pp. 28-29, *infra*).

STATEMENT OF THE CASE.

1918 p. 28. The Surety Company executed, as surety, a $22,000 bond to the Mills Company, to secure the performance of a purported contract by the Hartenfeld Bag Company (R. 9-10).

ec. 16-20. The Mills Company sued the Surety Company at law on the bond in both an Illinois and a Georgia State Court (R. 12, 23, 24, 205, 231-33, 242-250).

1919. arch 3. The Surety Company, in turn (before answering or otherwise appearing in either of the State Court suits) filed the present suit in a New York State Court (later removed to the Federal Court) against the Mills Company to cancel, and to enjoin the enforcement of, the bond upon the ground of fraud in its obtention (R. 1-14, 287).

pril 25. Instead of first making *in limine* an objection to the jurisdiction on the ground that the plaintiff, Surety Company, had an adequate remedy at law, the Mills

Company filed its answer and counterclaim, wherein after denying most of the facts as to the alleged fraud, it affirmatively pleaded as follows (R. 23-25):

First: Two "separate and distinct defenses" in that the Surety Company had an adequate remedy at law in its defenses to the pending Illinois and Georgia suits (R. 23-24).

Second: As a "*separate and distinct* counterclaim to the cause of action alleged in the complaint", the Mills Company alleged the material facts concerning the execution of the bond, the default thereunder, notice thereof, demand for payment, and thereupon prayed,

> "for *affirmative judgment* against the plaintiff [Surety Co.] on defendant's counterclaim for the sum of $21,050 with interest" etc. (R. 24-25).

Thereafter, the Mills Company moved to dismiss the Surety Company's bill upon the ground that it had an adequate remedy at law, in that it had pleaded the fraud in its answers to the Illinois and Georgia suits (R. 14-18).

The Federal Court denied the motion to dismiss, without prejudice to such action as the trial court might deem advisable (R. 20).

The Mills Company renewed its motion to dismiss because of an adequate remedy at law, which was

again "denied without prejudice to such action as trial judge may deem advisable" (R. 33)*.

The Surety Company filed its reply to the counterclaim, joining issue thereon, and further pleaded the fraud as a defense thereto (R. 27-30).

v. 20. **THE TRIAL OF THE EQUITY SUIT.**

The Mills Company did not renew,† before the trial court, its contention that the Surety Company had an adequate remedy at law; and the case went to trial on (*a*) the Surety Company's suit to cancel, and (*b*) the Mills Company's *"separate and distinct"* counterclaim to recover on the bond (R. 33, 206).

The proceedings may be thus summarized:

I. The Surety Company introduced a dozen witnesses and many exhibits to sustain its claim that the bond had been procured by fraud (R. 33, 196).

The record then recites (R. 196):

"Plaintiff's *prima facie* case closed".

The defendant, Mills Company, did not at any time during or at the close of the plaintiff's case, renew its motion to dismiss; but seemingly desired to have the

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*The motions to dismiss were denied presumably in accord with the Federal Practice that an equity suit should be fully heard before passing upon motions to dismiss for want of jurisdiction (*Krouse* v. *Brevard Tannin Co.*, 249 F. R. 538, 548; *Ralston Steel Car Co.* v. *Natl. Dump Car Co.*, 222 F. R. 590, 592).

†The suggestion in the Mills Company's "Supplementary Brief", pages 3, 4, that the motion to dismiss was renewed in the opening statement of counsel and "before the trial judge's announcement that he would have no discussion of the facts", is not sustained by a line of the record.

Federal Court pass not only on the question of fraud, but also on the breach of the bond and the "separate and distinct" affirmative counterclaim to recover $21,050 thereon.

II. The record then recites (R. 196)

"Defendant's Proofs".

The Mills Company then introduced its President, Mr. May, whose direct-examination did not touch "side, top or bottom" facts leading up to the execution of the bond or constituting the alleged fraud, but it endeavored solely and exclusively to prove the allegations of the Counterclaim seeking *affirmative* relief in the shape of a $20,150 judgment against the Surety Company on the bond, *i. e.:* events happening *after* the execution of the bond, such as the Bag Company's failure to perform its contract, the Mills Company's notice to the Surety Company of the principal's [Bag Company] default, and a demand for payment of the bond (R. 196-204).

After six immaterial questions on cross-examination, the Mills Company's counsel resumed again and proceeded further to offer in evidence certain documents, viz.:

(1) Certified copies of the pleadings in the Illinois and Georgia State Court suits—presumably in support of the plea of an adequate remedy at law, though nothing was said of that point (R. 205-206).

(2) The original $22,000 bond, which obviously could *only* have been offered in an effort *to sustain the attempt to recover thereon by the counterclaim.* It is thus described in the record (R. 206):

"MR. MOSES: As a matter of form, though I do not think it is necessary, *I will offer in evidence the particular bond in question,* to which is attached the contract entered into between the American Mills Company and the Hartenfeld Bag Company.

THE COURT: It has been thoroughly proved. Let it be delivered to the Clerk and impounded, if you please.

MR. MOSES: If the Court please, I do not exactly understand what the Court intends.

THE COURT: When the case is over you will understand. For the present it is an exhibit. All exhibits are in my custody, unless I choose to let them go out. That for the present I shall certainly not let go out.

Marked Defendant's "Exhibit E".

[The same is hereby impounded, being endorsed as follows:

"Original bond American Surety Company of New York, contract attached thereto being Exhibit E, is hereby ordered to be impounded by the Clerk and the same to be withdrawn only upon entry of an order. Dated November 20, 1919, Rose, *D. J.*"]

Defendant rests.

Both sides rest."

III. It is vitally important to observe that, up to this point, the Mills Company had not since the trial began, nor indeed since its motion had been denied without prejudice many months before, renewed or in any way evidenced* that it still insisted upon its claim that the Court had no jurisdiction in equity because of an adequate remedy at law.

But, on the contrary, it was bent on recovering upon the bond, and erroneously *thought*—and here is the secret of the whole procedure—that it could, at one and the same time, (1) defeat the Surety Company's bill on the ground that it had an adequate remedy at law, and yet (2) recover in the same suit on the bond.

*Except by the introduction of the records of the Illinois and Georgia suits, *after* it had first *completed* its proof to sustain an affirmative recovery on the bond under its counterclaim.

But that is exactly what it cannot do, because by suing on the bond, the Mills Company *ipso facto* waived the objection to the jurisdiction.

Of course, the Mills Company should, at least, before introducing any testimony to recover on the bond, have renewed its motion to dismiss for want of jurisdiction; but it did not want to do so, either from ignorance, or because if sustained, it would automatically have carried the counterclaim with it; and it still hoped for a favorable decision on its counterclaim on the bond, which if obtained, would give it all it wanted and obviate a trial in the Illinois or Georgia courts.

IV. The Court, having heard both sides fully, was now ready to decide the case and said (R. 206):

> "THE COURT: The only question I want to have argument upon is the law. There was a cold blooded fraud perpetrated upon the Surety Company; that is too plain for argument; I have not any doubt whatever about that".

The Court having thus plainly intimated its adverse opinion upon the merits of the case, the Mills Company's counsel, Mr. Moses, did not even then renew his motion to dismiss nor explicitly mention the defense of an adequate remedy at law, but he began an argument designed apparently to raise the distinct defense of "another action pending", although his argument is susceptible of a broader interpretation (R. 206-207).

After some colloquy, in which the Court indicated that the Mills Company (1) had perpetrated a "scandalous fraud" and (2) by asking affirmative relief in the way of a judgment on the bond had waived its jurisdictional objection, the case was taken under advisement (R. 208-209);

Later the District Court rendered an opinion reviewing the facts and said (R. 266):

> "The *fraudulent character* of the whole transaction *is too obvious* for further comment. The bond should be cancelled if this Court has in this case jurisdiction so to decree".

The Court then held that if the Mills Company had stood on its objection that the Surety Company had an adequate remedy at law, the bill must have been dismissed (*Insurance Co.* v. *Bailey,* 13 Wall. 616); but that it had waived the point and consented to the jurisdiction by asserting its counterclaim and seeking an affirmative recovery on the bond, saying (R. 267):

> "At the hearing it [Mills Co.] offered evidence in support of its prayer for an affirmative decree against the Surety. No attempt to withdraw the counterclaim was made until after Court had emphatically expressed an opinion upon the merits. Its waiver of objection to the jurisdiction was complete".

A decree was entered cancelling the bond and dismissing the counterclaim "upon the merits thereof" (R. 269).

The Circuit Court of Appeals *affirmed* the decree in a careful opinion and held (1) that the fraud was clear and (2) that the Mills Company had waived the objection to the jurisdiction, saying (273 F. R. 67, 72; R. 287):

> "On the trial at the close of the appellee's case, the appellant called witnesses and endeavored to establish the allegations of the counterclaim. At no time during the trial was the application to dismiss renewed upon the ground that the appellee had an adequate remedy at law.
>
> The Court thereupon indicated its determina-

tion to decide in favor of the appellee and against the appellant on the facts, and stated that the only question which it desired to have argued was on the question of law. Thereupon, the appellant urged that there was no equitable jurisdiction for the reason that the appellee had an adequate remedy at law, and the Court ruled that, since the counterclaim was interposed and the appellant asked affirmative relief, it had submitted itself to the jurisdiction of a court of equity, and gave a decree against the appellant. * * *

We think equity did not have jurisdiction but for the waiver of the appellant.

Pleading its counterclaim in the answer, and thereafter insisting upon it at the trial, and offering proof to sustain it, constituted a waiver. The equity power having been invoked, the right of the defendant to object because of the existence of a legal remedy can be waived. * * *

At no time did the appellant raise the objection until after it had pleaded its counterclaim, and while a motion to dismiss the bill was made and denied in advance of the trial, this was done without any prejudice to a renewal.

In place of renewing at the commencement of the trial, the appellant proceeded with the trial, and offered proof of its counterclaim and asked for judgment. When it observed that judgment on the facts was going against it, then for the first time during the course of the trial it insisted that the appellee had an adequate remedy at law. We think this conduct at the trial was tantamount to invoking the aid of a court of equity to exercise its jurisdiction in this case. Offering proof before the Court, without a jury, waived any objection to the jurisdiction of the court in equity to try and dispose of the suit. * * *

The courts never intended, nor had they the power to compel a defendant to plead a purely *legal* cause of action as a counterclaim to a suit

> in equity, and Rule 30 was never so intended. To do so would be in conflict with the Seventh Amendment. * * *
>
> What the appellant did here was voluntary—not compelled by any rule—to assert a cause of action at law by way of the counterclaim. This conduct was an election to proceed without a jury (citation omitted).
>
> As the cause proceeded, the trial Judge had it within his power to dismiss appellee's [Surety Co.'s] cause of action (if he concluded it was without merit), and could have retained jurisdiction on the questions presented by the proofs as to the counterclaim and could have rendered judgment on the merits thereof in favor of the appellant or appellee.
>
> The issue as to the counterclaim was presented by the reply to it, and the defenses there interposed.
>
> Where a party thus proceeds to trial before the Court without objection or exception, he voluntarily waives his right to jury".

The Mills Company contended that the filing of its counterclaim was *not* a voluntary waiver of jurisdiction, but was *compulsory* by Equity Rule 30, under penalty of waiving its right to recover on the bond.

The Court's response was that Equity Rule 30 did not compel the filing of a *legal* counterclaim; and that if it did, then it was void because it would deprive the Mills Company of a jury trial guaranteed under the Seventh Amendment (R. 289).

A writ of *certiorari* was then granted the Mills Company, presumably in order to clarify the interpretation and effect of Equity Rule 30, concerning which there has undoubtedly been a great diversity of opinion in the District Courts and Circuit Courts of Appeals.

SUMMARY OF POINTS DISCUSSED.

1. By filing a counterclaim asking affirmatively for a $21,050 judgment on the bond, the Mills Company waived (as it had the right to do) the jurisdictional objection that the Surety Company had an adequate remedy at law.

2. The filing of the Counter-claim was a purely voluntary act on the part of the Mills Company.

   Equity Rule 30 did not require it to be filed, under penalty of waiving any future right to recover on the bond in another suit.

3. Rule 30 does not govern pleadings alone, as insisted by the Mills Company; and even if it did, the Mills Company submitted to the jurisdiction by proving its case.

4. The decree below was right on the merits.

FIRST POINT.

By filing a counterclaim asking affirmatively for a $21,050 judgment on the bond, the Mills Company waived (as it had the right to do) the jurisdictional objection that the Surety Company had an adequate remedy at law.

1. The Mills Company should have objected to the jurisdiction at the very outset by a motion to dismiss before answering to the merits (*Reynes* v. *Dumont,* 130 U. S. 354, 395; *Brown* v. *Lake Superior Iron Co.,* 134 U. S. 530, 536; *Hollins* v. *Brierfield I. & C. Co.,* 150 U. S. 371, 381), which, if overruled, would have reserved the point and permitted it safely to plead to the merits (*Southern Pacific* v. *Denton,* 146 U. S. 202, 206).

Instead of that, it answered to the merits and combined therein both (*a*) an objection to the jurisdiction and (*b*) an *affirmative counterclaim* seeking a money judgment on the bond. That was a futile attempt to accomplish inconsistent aims (*Robb* v. *Voss,* 155 U. S. 13, 41-43), *i. e.,* to defeat, and yet utilize, the court's jurisdiction. There was not the slightest suggestion that the counterclaim was filed because of any supposed compulsion under Equity Rule 30 nor because it feared that its future right to recover on the bond in the State Court might be prejudiced by a failure to plead it here.

The Mills Company simply—but erroneously—thought that it could defeat the Surety Company's

bill on the ground that the latter had an adequate remedy at law, and yet recover on its own counterclaim; but that is exactly what the authorities say can not be done.

2. Assuming for the purpose of argument that the Surety Company had an adequate remedy at law, and that if the Mills Company had stood on its objection to the jurisdiction in equity, the bill would have been dismissed (R. 266, 288; *Insurance Co.* v. *Bailey,* 13 Wall. 616, 622; *Cable* v. *U. S. Life Ins. Co.,* 191 U. S. 288, 306-7; see also many cases cited in the Mills Company's Brief, p. 10, on the application for *certiorari*), it is well settled that the objection of an adequate remedy at law may be waived (*Metropolitan Ry. Receivership,* 208 U. S. 90, 109, 110; *McGowan* v. *Parish,* 237 U. S. 285, 295; *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371, 380; *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429, 554; *Reynes* v. *Dumont,* 130 U. S. 354, 395; *Southern Pacific* v. *United States,* 200 U. S. 341, 349; *Brown* v. *Lake Superior Iron Co.,* 134 U. S. 530, 536; *Perego* v. *Dodge,* 163 U. S. 160, 164);*

*This is in accord with the long established rule that in cases to which the judicial power extends as defined by the Constitution, *i. e.*, in "controversies between citizens of different States", either party may waive jurisdictional requirements which are really imposed only for his benefit, such as a requirement that a suit shall be brought in the District of the plaintiff's residence (*U. S.* v. *Hvoslef,* 237 U. S. 1, 12; *Thames & Mersey Ins. Co.* v. *U. S., Id.* 19, 24, 25; *In re Moore,* 209 U. S. 490, 501; *Western Loan Co.* v. *Butte & Boston Min. Co.,* 210 U. S. 368, 369; *Creagh* v. *Equitable Life,* 83 F. R. 849, 850, and cases there collated; *Cowell* v. *City Water Supply Co.,* 96 F. R. 769); or that a written stipulation should be filed to waive a jury (*Perego* v. *Dodge,* 163 U. S. 160, 166; *Kearney* v. *Case,* 12 Wall. 275).

In *Metropolitan Railway Receivership,* 208 U. S. 90, 109, 110, final recognition and approval was given of the principle of receivership law (intimated in *Hollins* v. *Brierfield, I. & C. Co.,* 150 U. S. 371, 380) that a Receiver would be appointed on the application of a simple contract creditor if the defendant did not raise the point of an adequate remedy at law (s. c. 198 F. R. at 737-8), the Court saying:

> "It is also objected that the Circuit Court had no jurisdiction because the complainants were not judgment creditors, but were simply creditors at large of the defendant railways. The objection was not taken before the Circuit Court by any of the parties to the suit, but was waived by the defendant consenting to the appointment of the receivers, and admitting all the facts averred in the bill. *Hollins* v. *Brierfield Coal & Iron Company,* 150 U. S. 371, 380. That the complainant has not exhausted its remedy at law—for example, not having obtained any judgment or issued any execution thereon—is a defense in an equity suit which may be waived, as is stated in the opinion in the above case, and when waived the case stands as though the objection never existed.
>
> In the case in the Circuit Court the consent of the defendant to the appointment of receivers, without setting up the defense that the complainants were not judgment creditors who had issued an execution which was returned unsatisfied, in whole or in part, amounted to a waiver of that defense. *Brown* v. *Lake Superior Iron Co.,* 134 U. S. 530; *Town of Mentz* v. *Cook,* 108 N. Y. 504, 508; *Horn* v. *Pere Marquette R. R. Co.,* 151 Fed. Rep. 626, 633."

In *McGowan* v. *Parish,* 237 U. S. 285, 295, it is said:

> "The equity jurisdiction having thus been properly invoked, the right of defendant to object because of the alleged existence of a legal remedy could be waived. *Reynes* v. *Dumont,* 130 U. S. 354, 395; *Kilbourn* v. *Sunderland,* 130 U. S. 505, 514; *Brown* v. *Lake Superior Iron Co.,* 134 U. S. 530, 536; *Re Metropolitan Railway Receivership,* 208 U. S. 90, 110".

3. It is equally well settled that the jurisdictional objection *is waived* if the defendant files a *counterclaim seeking affirmative relief* (*Merchants Heat & L. Co.* v. *Clow,* 204 U. S. 286, 290; *Original Consol. Min. Co.* v. *Abbott,* 167 F. R. 681, 682; *O. J. Lewis Mercantile Co.* v. *Klepner,* 176 F. R. 343); or, even if he invokes the aid of the court in a milder way, such as filing a petition for removal (*Cowell* v. *City Water Supply Co.,* 96 F. R. 769; *Creagh* v. *Equitable Life,* 83 F. R. 849); filing a demurrer which goes both to the jurisdiction and the merits (*Western Loan Co.* v. *Butte Min. Co.,* 210 U. S. 368, 371); or filing an amended petition (*In re Moore,* 209 U. S. 490, 496).

In *Merchants Heat & L. Co.* v. *Clow,* 204 U. S. 286, the plaintiff sued at law, and the defendant after unsuccessfully attacking the service of process, not only answered to the merits, but filed a counterclaim in recoupment arising out of the same transaction that the plaintiff sued on. The Court said:

> "We assume that the defendant lost no rights by pleading to the merits, as required, after saving its rights. *Harkness* v. *Hyde,* 98 U. S. 476;

Southern Pacific Co. v. *Denton,* 146 U. S. 202. *But by setting up its counterclaim* the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action and by invoking submitted to it.

It is true that the counterclaim seems to have arisen wholly out of the same transaction that the plaintiff sued upon, and so to have been in recoupment rather than in set-off proper. But even at common law, since the doctrine has been developed, a demand in recoupment is recognized as a cross demand as distinguished from a defense. Therefore, although there has been a difference of opinion as to whether a defendant by pleading it is concluded by the judgment from bringing a subsequent suit for the residue of his claim, a judgment in his favor being impossible at common law, the authorities agree that he is not concluded by the judgment if he does not plead his cross demand, and that whether he shall do so or not is left wholly to his choice. *Davis* v. *Hedges,* L. R. 6 Q. B. 687; *Mondel* v. *Steel,* 8 M. & W. 858, 872; *O'Connor* v. *Varney,* 10 Gray, 231.

This single fact shows that the defendant, if he elects to sue upon his claim in the action against him, assumes the position of an actor and must take the consequences. The right to do so is of modern growth, and is merely a convenience that saves bringing another suit, not a necessity of the defense. * * *

There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits. *De Lima* v. *Bidwell,* 182 U. S. 1, 174; *Fisher* v. *Shropshire,* 147 U. S. 133, 145; *Farmer* v. *National Life Association,* 138 N. Y. 265, 270. As we have said, there is no question at the present day that, *by an*

answer in recoupment, the defendant makes himself an actor, and to the extent of his claim, a cross plaintiff in the suit. See *Kelly* v. *Garrett,* 1 Gilm. (Ill.) 649, 652; *Ellis* v. *Cothram,* 117 Illinois, 458, 461; *Cox* v. *Jordan,* 86 Illinois, 560, 565."

The Counsel for the Mills Company concedes that if, prior to the New Equity Rules, it had filed such a counterclaim by way of cross bill, praying for affirmative relief on the bond, such an action would have been a waiver of the jurisdictional objection that the Surety Company had an adequate remedy at law (see Brief in support of the Petition for *certiorari,* p. 20).

It may therefore be assumed that unless the New Equity Rules have changed the situation, the Mills Company waived its jurisdictional objection.

SECOND POINT.

The filing of the Counter-claim was a purely voluntary act on the part of the Mills Company.

Equity Rule 30 did not require it to be filed, under penalty of waiving any future right to recover on the bond in another suit.

The Mills Company contends that the filing of its counterclaim was not a *voluntary* act, but, as it was concededly* a claim "arising out of the transaction which

*See cases cited in Mills Company's Brief in support of its Petition for *Certiorari,* p. 16.

is the subject matter of the suit", the Mills Company was *compelled* to file it (or waive any recovery on the bond in a future suit) by the second paragraph of Equity Rule 30, which for convenience of reference may be subdivided into three clauses, as follows:

CLAUSE A { The answer *must* state in short and simple form any counterclaim *arising out of the transaction which is the subject-matter of the suit,*

CLAUSE B { and *may,* without cross-bill, set out any set-off or *counter-claim* against the plaintiff *which might be the subject of an independent suit in equity against him,*

CLAUSE C { and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims.

There has been the greatest diversity* [some illustrations of which are excerpted in the margin] of opin-

*The divergent authorities are collated in *Electric Boat Co.* v. *Lake Torpedo Boat Co.,* 215 Fed. 377, 379; *Buffalo Specialty Co.* v. *Vancleef,* 217 Fed. 91, 94; *Christensen* v. *Westinghouse Traction Brake Co.,* 235 Fed. 898, 899, 900; *Ohio Brass Co.* v. *Hartman Electrical Co.,* 243 Fed. 629, 630; *Victor Talk. Mach. Co.* v. *Brunswick-Balke Co.,* 279 Fed. 758, 760.

The arguments in favor of a liberal construction of Rule 30 will be found in *Marconi Wireless Tel. Co.* v. *Natl. E. S. Co.,* 206 F. R. 295; *Electric Boat Co.* v. *Lake Torpedo Boat Co.,* 215 F. R. 377; *Buffalo Specialty Co.* v. *Vancleef,* 217 F. R. 91; and *Victor Talk. Mach. Co.* v. *Brunswicke-Balke Co.,* 279 F. R. 758; while those insisting upon a narrow interpretation of the rule may be found in *Terry Steam Turbine Co.* v. *B. F. Sturtevant Co.,* 204 F. R. 103; *Adamson* v. *Shaler,* 208 F. R. 566, and *Ohio Brass Co.* v. *Hartman Elect. Co.,* 243 F. R. 629.

In some cases it is held that despite the provision of the second clause ["B"] that the defendant may file *any* counterclaim "which might be the subject of an independent suit in equity", he is

ion among the District Courts and Circuit Courts of Appeals as to its scope and meaning, for reasons clearly

nevertheless limited to those claims "arising out of the transaction which is the subject matter of the suit"—thereby practically rendering the second clause useless, making it identical with the first clause, and leaving in hopeless confusion whether "must" or "may" applies (*Terry Steam Turbine Co.* v. *B. F. Sturtevant Co.*, 204 F. R. 103, 105, 106; *Williams Patent Crusher Co.* v. *Kinsey M'fg. Co.*, 205 F. R. 375, 376; *Adamson* v. *Shaler*, 208 F. R. 566; *Klauder-Weldon Dyeing Co.* v. *Giles*, 212 F. R. 452; *Sydney* v. *Mugford Ptg. & Eng. Co.*, 214 F. R. 841; *Christensen* v. *Westinghouse Traction Brake Co.*, 235 F. R. 898, 900; *Ohio Brass Co.* v. *Hartman Elect. M'fg. Co.*, 243 F. R. 629).

The contrary is held in *Marconi Wireless Co.* v. *Nat. E. S. Co.*, 206 F. R. 295, 301-2; *Vacuum Cleaner Co.* v. *Amer. Rotary Co.*, 208 F. R. 419; *Electric Boat Co.* v. *Lake Torpedo Boat Co.*, 215 F. R. 377, 380; *Buffalo Specialty Co.* v. *Vancleef*, 217 F. R. 91, 93; *Harper Bros.* v. *Klaw*, 232 F. R. 609, 611; *Paramount Hosiery Co.* v. *Walter Snyder Co.*, 244 F. R. 192; *Champion Spark Plug Co.* v. *Champion Ignition Co.*, 247 F. R. 200, 205.

Again, some hold that the counterclaim authorized in the second ("B") clause is only that kind of claim, which, before the new equity rules, could have been the subject of a cross suit, and that the new rule is merely declaratory of the old law [*Williams* (205 F. R. 375), *Sydney* (214 F. R. 841, 844), *Christensen* (235 F. R. 898, 900) and *Ohio Brass* (243 F. R. 629, 631) cases] while the following cases hold a defendant is given by the second [B] clause the same broad right to bring as many equitable causes of action by way of counterclaim as the plaintiff is given to join causes of action by Rule 26 [*Electric Boat Co.* (215 F. R. 377, 381) and *Paramount Hosiery* (244 F. R. 192, 194) cases], which latter cases explicitly refute the contention made in the *Adamson* (208 F. R. 566); *Terry Steam Turbine* (204 F. R. 103), and *Christensen* (235 F. R. 898, 900) cases that such a construction in favor of the defendant's right would leave the plaintiff helpless by reply (on re-counterclaim) to assert an affirmative defense against new claims of the defendant.

There are all sorts of cross lines of cleavage on other points, as for example, the *Marconi* (206 F. R. 295, 301) and *Electric Boat* (215 F. R. 377, 383) cases hold that the "independent suit in equity" means a suit which is maintainable in the particular court in which the original suit was brought; while many other cases hold that the counterclaim is maintainable even if it could not have been originally brought in that court, because the plaintiff by suing there has consented in advance (and in case of removal) to be sued by counterclaim (*U. S. Expansion Bolt Co.*

summarized in *Paramount Hosiery Co.* v. *Walter Snyder Co.*, 244 F. R. 192 (1917), wherein it is added:

> "There is a natural predilection on the part of every lawyer to align himself on one side or the other of the controversy. Just as naturally he is inclined to that construction of Rule 30 which advances his views of the practice as it should be. The state of professional opinion is reflected in the rulings of the courts. This has developed a difference of opinion which only a *commanding voice* can bring into accord. Judicial opinion would seem to be at an exact equipoise, as counsel agree that the reported cases show five rulings in accord with one view and five the other."

It has been held by several Circuit Courts of Appeal and District Courts that on account of the mandatory "must", as used in the first [A] clause,

> "The answer *must* state * * * any counterclaim *arising out of the transaction* which is the subject-matter of the suit",

a failure to assert by counterclaim a claim "arising out of the transaction" sued on, constitutes a waiver of such claim, so as to prevent its subsequent assertion even in a State Court (*Marconi Wireless Tel. Co.* v. *H. G. Kroncke Hdw. Co.*, 216 F. R. 186, 189; *Buffalo Specialty* case, 217 F. R. 91, 93; *Champion Spark Plug* case, 247 F. R. 200, 204; *Howard* v. *Leete*, 257 F. R. 918, 924), while the contrary is held (where the jurisdiction rests on diverse citizenship) in *U. S. Expansion Bolt Co.* v. *H. G. Kroncke Co.*, 234 F. R. 868, 875; which in turn is denied in *Portland Wood Pipe Co.* v. *Slick Bros. Co.*, 222 F. R. 528; and the effect of a dismissal of the bill upon the right to give relief on a counterclaim is decided one way in *Linden Inv. Co.* v. *Houston Bros. Co.*, 221 F. R. 178, 181, and *Amer. Falls, etc., Co.* v. *Standard Brokerage Co.*, 248 F. R. 487, 489, and another way (although on a different ground) in *Buffalo Specialty Co.* v. *Vancleef*, 217 F. R. 91, 94.

Natl. E. S. Co., 206 F. R. 295, 298; *Salt's Textile Co.* v. *Tingue Mfg. Co.*, 208 F. R. 156, 158; *Electric Boat Co.* v. *Lake Torpedo Boat Co.*, 215 F. R. 377, 384; *Portland Wood Pipe Co.* v. *Slick Bros. Co.*, 222 F. R. 528, 530; *Krupp* v. *Bell*, 243 F. R. 157, 161; *Caflisch* v. *Humble*, 251 F. R. 5; *Victor Talk. Mach. Co.* v. *Brunswick-Balke Co.*, 279 F. R. 758, 761). With the anomalous result [in those jurisdictions which hold that the only counterclaims ever assertable under Rule 30 are such as arise out of the transaction sued on; see pp. 18-21 note, *supra*] that despite the permissive "may" a defendant *must* assert his claim or be forever barred.

This now brings us to the real diversity of opinion as to the *kind* of counterclaim—whether legal or equitable—that is meant by the first clause [A] of Rule 30.

Some cases hold that it is only *equitable* counterclaims which are required to be asserted (under penalty of waiver) by the first clause (*Terry Steam Turbine Co.* v. *B. F. Sturtevant Co.*, 204 F. R. 103, 105, 106; *Motion Picture Patents Co.* v. *Eclair Film Co.*, 208 F. R. 416, 418; *Williams* v. *Adler Co.*, 227 F. R. 374, 378; *Ohio Brass Co.* v. *Hartman Electrical Co.*, 243 F. R. 629, 631; *Bankston* v. *Com. Trust & Savings Bk.*, 250 F. R. 985; *American Mills Co.* v. *Am. Surety Co.*, 273 F. R. 67, 72-74) while others hold that *any legal* or equitable counterclaim arising out of the transaction must be asserted (*Salt's Textile Mfg.*

Co. v. *Tingue Mfg. Co.*, 208 F. R. 156; *Electric Boat Co.* v. *Lake Torpedo Boat Co.*, 215 F. R. 377, 380; *Portland Wood Pipe Co.* v. *Slick Bros. Co.*, 222 F. R. 528; *Krupp* v. *Bell*, 243 F. R. 157, 161; *Caflisch* v. *Humble*, 251 F. R. 1, 5; *Howard* v. *Leete*, 257 F. R. 918, 924), or be forever barred (*Caflisch* v. *Humble* and many other cases), but without the constitutional question under the Seventh Amendment being raised.

This Court must decide between those opposing constructions. It seems needless to lengthen this Brief by long quotations from the conflicting authorities, which have been heretofore classified and cited so that resort may be easily had to their contentions if desired (pp. 18-20, *supra*).

We submit briefly:

I. *The term "counterclaim" as used in Equity Rule 30 means an equitable—not legal—counterclaim.*

This is a mere matter of interpretation. This Court must know what it intended by its own rules; and any lengthy discussion would be superfluous.

1. In view of the constitutional recognition of the distinction between law and equity, which must always be kept separate (Const. Art. III, § 2, clause 1; R. S. 913, 917. New Equity Rule 22; SANBORN, *J.*, dissenting in *Schurmeier* v. *Conn. Mut. Life Ins. Co.*, 171 F. R. 1, 16) and the fact that the new equity rules are "rules of practice for the courts of *equity*", one would

naturally assume that it was an *equitable* counterclaim which was provided for, and that it meant the same thing when used in the first [A] and second [B] clauses; in each instance an *equitable* claim; but in the first clause, one that arose out of the transaction in suit, and in the second clause any equitable claim that might be sued on in equity. That seems the plain and natural construction and, if adopted, will solve all the difficulties.

In *Terry Steam Turbine Co.* v. *B. F. Sturtevant Co.*, 204 F. R. 103, 106 (Mass.), the Court said that Rule 30 did not relate

> "to cross-claims in general, but to counter-claims *in equity only* * * * The new rules cannot of course be construed to affect in any way the distinction between law and equity imposed by statute upon the federal courts."

In *Motion Picture Patents Co.* v. *Eclair Film Co.*, 208 F. R. 416, 418 (N. J.), it was said that certain paragraphs of a counterclaim

> "are objectionable for a greater (because incurable) reason in that the defendant thereby seeks to set up in an equity suit a claim that can only be maintained in a suit *at law.*"

In *Ohio Brass Co.* v. *Hartman Electrical Co.*, 243 F. R. 629, 631, it is said

> "This rule was intended to simplify equity pleading, and not to revolutionize equity practice. All

> agree that it cannot enlarge the jurisdiction of a Federal court, or of a court of equity. The set off or counterclaim must manifestly, therefore, be one cognizable in a court of *equity;* that is, it must be such as could be made the subject of an independent suit in equity. Manifestly, also the jurisdiction of the Federal court cannot be enlarged by this rule."

2. If it be suggested that such a construction not only would not *compel* a defendant to assert a legal counterclaim, but would affirmatively *prevent* the assertion of a legal counterclaim, even when arising out of the transaction sued on, we respond that such has always been the rule except that to the extent—*and no further*—that under the old practice a defendant could by cross bill *which sought equitable relief,* assert a legal claim, probably he *may* (but not *must*) still do so as a part of established equity practice which the new rules did not intend to deny. Furthermore, if a defendant asserts an exclusively *legal* counterclaim, *his* act is a consent to the jurisdiction; and unless the original plaintiff objects (as he may do), on the ground of an adequate remedy at law, the court may decide the *legal* controversy thus presented.

3. If "counterclaim" means *"equitable* counterclaim", then (1) the Mills Company was not *compelled* to assert its counterclaim on the bond, which prayed for a pure money judgment with no element of equitable relief; (2) its action was *voluntary,* and hence (3) under the authorities cited (pp. 13-17, *supra*) it waived its jurisdictional objection to the bill.

II. *Rule 30 is in violation of the Seventh Amendment and unconstitutional if it be construed to compel a defendant to assert by counterclam any purely legal claims he may have "arising out of the transaction" sued on.*

The Seventh Amendment provides:

> "In suits at common law * * * the right of trial by jury shall be preserved."

In view of the decisions in *Capital Traction Co.* v. *Hof*, 174 U. S. 1, and *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, and the authorities therein cited, it is clear that Rule 30, if construed to include *legal* counterclaims, is void, because it deprives a litigant of his constitutional right to have his purely *legal* cause of action tried *at law by a jury*, and re-examined only by rules of the common law. A litigant cannot be deprived of his right to have his purely legal cause of action tried at law and his damages assessed by a jury, merely because he happens to be made a defendant in an equity suit, involving generally the subject matter of such legal action.

This is entirely consistent with the rule that when an equity court assumes jurisdiction over a subject, it will exercise complete jurisdiction over all branches of the matter even if some of the questions involved be legal and not equitable; but this is so, simply because the decision of the legal issues is incidental to granting complete equitable relief.

Nothing can be added to the pithy comment of the Circuit Court of Appeals (R. 289):

> "The courts never intended, *nor had they the power* to compel a defendant to plead a purely *legal* cause of action as a counterclaim to a suit in equity, and Rule 30 was never so intended. To do so would be in conflict with the Seventh Amendment of the Federal Constitution."

If this rule be construed to require *legal* counterclaims to be asserted, then it affords an easy way for a prospective defendant to a suit at law (who does not wish to try it before a jury in the court where it is likely to be brought), to file some sort of an equity suit against the intending plaintiff and thus force the latter to assert his legal claim therein, instead of at law as he had the right to do.

THIRD POINT.

Rule 30 does not govern pleadings alone, as insisted by the Mills Company; and even if it did, the Mills Company submitted to the jurisdiction by proving its case.

In the Mills Company's brief in support of its Petition for *certiorari* (pp. 20-21), it is suggested that the constitutional objection to the first clause [A] of Rule 30, can be obviated by restricting its mandatory requirement to the mere *pleading* of the legal counterclaim without requiring the legal issues thereon to be

submitted for decision. There are two objections to this very strained suggested construction of Rule 30:

1. There is nothing in the *language* of the Rule to suggest that the defendant "must" or "may" file a counterclaim, but without being required to prove its allegations under penalty of default for not doing so. If the Rule had been intended to have any such limited effect, it would have said so.

2. But even assuming, as the Mills Company suggests, that it was compulsory *only* to the extent of requiring a counterclaim to be *filed* without requiring a trial of the legal issue, nevertheless, the Mills Company did not content itself with complying with the compulsory *filing* of the counterclaim, but went further and *voluntarily undertook to prove the allegations of its counterclaim* and sought to recover judgment thereon. By thus voluntarily proving its counterclaim and seeking a favorable decision, it waived the jurisdictional objection in accordance with the authorities cited pages 13-17, *supra*.

If the District Court, instead of indicating an opinion in favor of the Surety Company, had announced a decision on the merits in favor of the Mills Company, the latter would have vigorously asserted its right to a judgment on the counterclaim; and the Surety Company would never have been heard to say that the counterclaim was *filed* merely as a pleading without any intention of a recovery thereon.

FOURTH POINT.

The Decree below was right on the merits.

Inasmuch as the Mills Company's Brief makes no attempt to controvert the findings of the District Court and of the Circuit Court of Appeals regarding the "scandalous fraud" attempted to be purported upon the Surety Company, but little need be said in support of the decree on the merits.

The findings below (R. 264-268, 284-290) state the facts, which may be more briefly summarized as follows:

In September, 1918, the Hartenfeld Bag Company, which was in a failing condition, owed the Mills Company about $22,000 which it was unable to pay. The Mills Company and the Bag Company executed a pretended contract, which they procured the Surety Company to guarantee as surety for the Bag Company. The contract recited that the Mills Company *had paid in advance* to the Bag Company $22,100; for which the Bag Company was to deliver certain merchandise within seventy-five days; in default of which delivery, the money was to be returned. The Bag Company failed to make the delivery and went into bankruptcy. It then developed that the Mills Company *had never made the recited advance payment* of $22,000; but, that, some days after the contract and bond had been executed, the Mills Company and Bag Company exchanged checks simultaneously to create the appearance of a genuine trans-

action. The effect of the scheme was that the Mills Company in place of a bad debt against the Bag Company, received a guaranty of the Surety Company for the full amount of a bad debt, while the Surety Company thought it was guaranteeing the future performance of a *bona fide* contract for which its principal, the Bag Company, had received in advance the full cash consideration.

Without burdening the Court with the complicated details of the fraud, it is submitted that the failure of the Mills Company to defend the fraud in this Court, coupled with the opinions of both lower Courts, is sufficient to justify the decree on the merits.

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WM. MARSHALL BULLITT,
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Washington, D. C.,
November 20, 1922.

FILED
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WM. R. STANS
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No. 118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

AMERICAN MILLS COMPANY,

Petitioner,

vs.

AMERICAN SURETY COMPANY,

Respondent.

SUPPLEMENTARY BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

AMERICAN MILLS COMPANY, a corporation organized under the laws of Georgia, Petitioner, against AMERICAN SURETY COMPANY of New York, a corporation organized under the laws of New York, Respondent.	No. 118.

BRIEF OF PETITIONER, SUPPLEMENTARY TO BRIEF NOW ON FILE.

Petitioner, in this brief, supplementary to the brief already filed with the petition for writ of certiorari heretofore granted herein, desires to address itself solely to a discussion of the question of whether it waived its objection to the jurisdiction of the court as set out in the proceedings taken by the petitioner in this case.

Under the Federal Equity Rules, there was only one method available to the petitioner to invoke the question of jurisdiction of the court, namely, by "motion to dismiss or in the answer," as provided in Rule 29 of the Federal Equity Rules of Practice. The question could not be raised by special appearance; such practice being available solely when a party seeks to raise the question of jurisdiction over the person.

McComb vs. U. S. Housing Corp., 264 Fed. Rep., 589.

It becomes necessary, therefore, for the petitioner to show that it acted strictly within and pursuant to the requirements of the Federal Equity Rules, and to that end, an examination of the record discloses the following:

1. The motion to dismiss for lack of jurisdiction was made at the outset of the case, when only the complaint and answer were before the court (Record, page 14).

2. The defenses attacking the jurisdiction of the court were raised specially in the answer (Record, page 20).

3. The motion to dismiss was renewed when all the pleadings (complaint, answer and reply) were before the court (Record, page 31).

4. Both of these motions were conditionally denied by the court, the court entering two orders "that defendant's said motion so to dismiss plaintiff's complaint be and the same is hereby denied

without prejudice to such action as the trial judge may deem advisable" (Record, pages 20 and 33).

5. The motion was renewed at the trial (despite respondent's contention to the contrary and before the trial judge's announcement that he would have no discussion of the facts).

6. After the opening statements of both parties in the trial court, and pursuant to the settled practice in the Federal Courts,

> Kraus vs. Tanning Co., 249 Fed. Rep., 538,
> Ralstone Steel Car Co. vs. National Dump Car Co., 222 Fed. Rep., 590,
> O'Keefe, et al. vs. City of New Orleans, 273 Fed. Rep., 560,

and in pursuance of the directions both of the judge upon motions, in his opinion, denying the motions to dismiss (Record, pages 31-32) and of the trial court, the case proceeded to proofs. As a part of its proof, petitioner introduced evidence in support of its defenses in its answer, that respondent had an adequate and complete remedy at law (Record, pages 205-206).

7. At the close of the case and in response to the trial court's direction (Record, page 206) that it wanted argument on the law question only, the petitioner renewed its motion to dismiss the complaint and insisted upon its defenses, that the plaintiff had a plain, adequate and complete remedy at law.

Under the situation of this case as it came before the trial court, petitioner could have adopted no

other practice. The judge, upon motion calendar, had all of the pleadings before him. The motion to dismiss admitted in full the allegations of the bill. Nothing further could be added thereto by any testimony to be adduced upon the trial. Therefore, a formal renewal of the motion at the opening simply for the purpose of noting an exception on the record could have served no purpose beyond directing the court's attention to the fact that the motion had already been made. This was done (opening statement of counsel for petitioner), and the trial court specifically deferred the discussion of that question until after all the evidence was in. So also, a renewal of the motion at the close of plaintiff's case could have served no purpose, for at that time, the court had before it no additional facts than were admitted by petitioner's motion to dismiss based upon the pleadings. Consequently, petitioner proceeded with its proofs.

1. It offered evidence tending to controvert the plaintiff's testimony (Record, page 175, et seq.).

2. Evidence to support its special defenses attacking the jurisdiction (Record, pages 205-206).

3. Proof which the court below has held was in support of its affirmative case.

Petitioner could not have stopped its proofs after the introduction of this evidence in support of its affirmative defenses and then renewed the motion to dismiss and await the determination of that motion before proceeding with the proof of its counterclaim. Under Rule 30, it was compelled to plead this counterclaim as a part of its answer and under

the direction of both the trial judge and the judge on motion calendar, and under the established Federal practice, it was obliged to introduce all of its proof and then await the disposition of its attack upon the jurisdiction of the court. This it did.

It is respectfully submitted that the record of the proceedings, as outlined above, contain no suggestion of any waiver of, or any intent to waive by the petitioner, its defenses that the plaintiff had a plain, adequate and complete remedy at law.

The point is made that the petitioner should have moved the transfer of this case to the law side of the court pursuant to Federal Equity Rule 22, and by not having done so acquiesced in the trial of all issues in the case by the Chancellor without the intervention of a jury.

The complaint could, in no instance, be transferred to the law side. Either respondent had a cause of action in equity or it had no standing as a complainant in any court. Respondent's action was to cancel the instrument on the ground of its procurement through alleged fraud and misrepresentations. This certainly could not be the subject of a complaint in a court of law. Respondent's only position in a court of law would be as a defendant in an action to enforce the instrument in question. Such a state of facts (in the absence of special circumstances calling for the interposition of a court of equity) amounted to nothing more than a legal defense. Such has been the law, as enunciated in the case of *Phoenix Mutual Ins. Co.* vs. *Bailey*, 13 Wallace, 616, 20 L. Ed., 501. An examination of this case will disclose that fraudulent misrepresentation and the fraudulent suppression of material facts are the principal grounds

for the relief prayed in the bill of complaint, to-wit: The cancellation of an insurance contract procured through such fraudulent practices.

The Court, in that case, said:

> "Courts of equity, unquestionably, have jurisdiction of fraud, misrepresentation and fraudulent suppression of material facts in matters of contract, but where the cause of action is 'a purely legal demand,' and nothing appears to show that the defense at law may not be as perfect and complete as in equity, a suit in equity will not be sustained in a Federal Court, as it is clear that the case, under such circumstances, is controlled by the 16th Section of the Judiciary Act."

Thus, it will be seen that the complaint could not have been the subject of a transfer to the law side of the trial court under Rule 22. Consequently, there was no alternative for the trial court but to have dismissed the bill for lack of jurisdiction in equity, under the case of *Phoenix Mutual Ins. Co.* vs. *Bailey, supra.* In that event the Court below would immediately have lost all power to hear any of the issues in the case, and Federal Equity Rule 23 would have had no application, for the dismissal of the complaint would have been a determination that the matter was not "a suit in equity" as that rule provides.

The issues then remaining would have been those embodied in petitioner's counterclaim, and respondent's reply, and in this state of the case it would have been incumbent upon the trial court, under Rule 22, of its own volition forthwith to

transfer the remaining issues as embodied in petitioner's counterclaim and the reply thereto, to the law side of the court, "with only such alteration in the pleadings as shall be essential," namely, petitioner becoming the plaintiff, and respondent becoming the defendant.

American Falls Milling Co. vs. Standard Brokerage & Dist. Co., 248 Fed. Rep., 487;
Linden Inv. Co. vs. Honstain Bros. Co., 221 Fed. Rep., 178;
Corsicana Nat. Bank vs. Johnson, 218 Fed. Rep., 822;
Pierce vs. National Bank of Commerce in St. Louis, 268 Fed. Rep., 487.

Respectfully submitted,

HENRY UTTAL,
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Mr. Henry Uttal for petitioner.

Mr. Wm. Marshall Bullitt, with whom *Mr. Henry C. Willcox* and *Mr. Allan C. Rowe* were on the brief, for respondent.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This case involves a question of procedure and turns on the construction of Equity Rule 30. An understanding of the point at issue requires a statement of the facts and the course of the litigation.

In September, 1918, the Hartenfeld Bag Company, which was in a failing condition, owed the American Mills Company, the petitioner, about $22,000, which it was unable to pay. The Mills Company and the Bag Company made a contract, the performance of which by the Bag Company the American Surety Company guaranteed. The contract recited that the Mills Company had paid in advance to the Bag Company $22,100 for which the Bag Company was to deliver certain merchandise within seventy-five days, and in default of this delivery, the money was to be returned. The Bag Company delivered only $1,050 worth of goods and then went into bankruptcy. The fact was that the Mills Company had never made the advance payment of $22,000 recited in the contract, but instead of that, some days after the execution of the contract, the Mills Company and the Bag Company exchanged checks for a little less than this amount in order to create the appearance of a genuine transaction. The effect of what was done was that the Mills Company received a guaranty from the Surety Company of a bad debt, while the latter company thought it was insuring the performance of a *bona fide* contract of sale and delivery of goods by the Bag Company for which that company had received the full purchase price in advance. In December, 1918, after demand for payment

and refusal, the Mills Company, a corporation of Georgia, sued the Surety Company, a corporation of New York, on its guaranty in a state court in Georgia and in a state court in Illinois. In March, 1919, the Surety Company, before appearing in the Georgia or Illinois courts, filed the suit at bar in a state court in New York against the Mills Company seeking to cancel the guaranty on the ground of fraud and to enjoin its enforcement. The Mills Company removed the cause to the equity side of the District Court below, and then filed an answer and counterclaim in which it denied the alleged fraud and pleaded as a separate and distinct defense, that the Surety Company had an adequate remedy at law by setting up the alleged fraud as an answer to the suits in Georgia and Illinois, and second, as "a separate and distinct counterclaim to the cause of action alleged in the complaint" set up the execution of the guaranty, the default thereunder, notice to the Surety Company, demand for payment, refusal thereof and a prayer for "judgment against the plaintiff, on defendant's counterclaim, for the sum of $21,050, with interest." Thereafter the Mills Company twice moved to dismiss the action on the ground that the plaintiff had an adequate remedy at law and these motions were denied without prejudice to such action as the trial court might deem advisable. When the cause came on for hearing the Surety Company introduced proof of the fraud. The Mills Company introduced no evidence on the issue of fraud but made proof of the execution of the guaranty and the facts subsequent thereto to show the liability of the Surety Company and put the contract of guaranty in evidence. The court directed that it be delivered to the clerk and impounded. After both sides had rested in the case, the court called for an argument on the law of the case, announcing with emphasis that the fraud had been clearly shown. The court entered a decree canceling the guaranty, holding

that the defendant had waived its defense that there was an adequate remedy at law and had thereby given the court of equity jurisdiction to grant the relief prayed for by cancelation of the guaranty. *American Surety Co.* v. *American Mills Co.*, 262 Fed. 691. On appeal, the decree was affirmed by the Circuit Court of Appeals, 273 Fed. 67.

It is conceded by the respondent that its bill in equity in the District Court should have been dismissed because it had an adequate remedy at law. The cases of *Insurance Co.* v. *Bailey*, 13 Wall. 616, 622, and *Cable* v. *United States Life Insurance Co.*, 191 U. S. 288, 306, 307, settle that. Respondent therefore relies solely on the waiver of this defect by the Mills Company in doing what it did in the District Court. A defendant in a bill of equity may waive such a defect. *McGowan* v. *Parish*, 237 U. S. 285, 295; *Re Metropolitan Railway Receivership*, 208 U. S. 90, 109, 110; *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 380; *Reynes* v. *Dumont*, 130 U. S. 354, 395; 1 Daniell's Ch. Pr. (4th Amer. ed.) 555.

Did petitioner waive it? It made the objection seasonably both by answer and by motions to dismiss. The motions were denied without prejudice to their renewal when the cause should come on for hearing before the trial court. The defendant instead of renewing its motion to dismiss or insisting on the sufficiency of the first defense of its answer, introduced proof of its right to an affirmative judgment for the full amount of the guaranty, putting the written instrument in evidence. This certainly constituted a waiver unless the contention of the defendant, the petitioner here, that Equity Rule 30 required it to put in proof of its claim on penalty of being barred from prosecuting it at law, is sound.

The relevant part of Rule 30 is as follows:

"The answer *must* state in short and simple form any counter-claim arising out of the transaction which is the

subject matter of the suit, and *may*, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims." (Italics ours.)

The petitioner argues that *must* and *may* are here set over against one another for the purpose of enforcing the intention and effect of the rule to require the defendant in an action in equity to set out any counterclaim arising out of the subject-matter of the bill, but to leave it to the option of the defendant whether a counterclaim or setoff not arising out of the same transaction shall be interposed or shall be prosecuted by independent bill. The respondent contends that while this may be correct, the counterclaim growing out of the same transaction must be an equitable claim and not a legal one as here. We concur in this view.

The new Equity Rules were intended to simplify equity pleading and practice by limiting the pleadings to a statement of ultimate facts without evidence and by uniting in one action as many issues as could conveniently be disposed of. But they normally deal with subjects-matter of which, under the dual system of law and equity, courts of equity can properly take cognizance. They certainly were not drawn to change in any respect the line between law and equity as made by the federal statutes, practice and decisions when the rules were promulgated. By the construction which petitioner would put upon Rule 30, it is an attempt to compel one who has a cause of action at law to bring it into a court of equity and then try it without a jury whenever the defendant in that cause can find some head of equity jurisdiction under which he can apply for equitable relief in respect of the subject-matter. The order of procedure as between the law and equity

sides in such cases always has been that the equity issue is first disposed of by the chancellor and then, unless that ends the litigation, the original plaintiff may have his action at law and his trial by jury secured him by the Seventh Amendment of the Constitution. *Liberty Oil Co.* v. *Condon National Bank, ante*, 235. Petitioner's construction of Rule 30 would deny the successful defendant in the equity action this right. Petitioner seeks to avoid the dilemma by the suggestion that the rule would be satisfied by merely pleading the action at law without proving it, but this would be futile. The counterclaim referred to in the first part of the paragraph must therefore be an equitable counterclaim, one which like the setoff or counterclaim referred to in the next clause could be made the subject of an independent bill in equity. The counterclaim and the setoff and counterclaim in the two clauses are *in pari materia*, except that the first grows out of the subject-matter of the bill and the other does not. That which grows out of the subject-matter of the bill must be set up in the interest of an end of litigation. That which does not, may be set up if the defendant wishes in one proceeding in equity quickly to settle all equitable issues capable of trial between them in such a proceeding, even though they are not related. *Buffalo Specialty Co.* v. *Vancleef*, 217 Fed. 91. The formality of cross-bills is not required, and the rule goes as far as possible to facilitate the prompt disposition of equitable controversies between the same litigants. The rule should be liberally construed to carry out its evident purpose of shortening litigation, but the limitation of counterclaims to those which are equitable is imperative. Equity Rule 30 was evidently suggested by Order XIX, Rule 3, of the English practice, but as the division between equity and law jurisdictions does not now obtain in the English courts, the English rule applies to all actions either at law or in

equity—Hopkins' Federal Equity Rules, 3rd ed., p. 195—and consideration of it does not aid us in the question we are discussing.

The result is that the petitioner as defendant was not obliged to set up and prove its action at law under Rule 30, and when it did so, by its affirmative action, it waived its previous objection to the equitable jurisdiction and also its right of trial by jury. An analogous effect of such affirmative action in pressing a counterclaim is seen in *Merchants Heat & Light Co.* v. *J. B. Clow & Sons*, 204 U. S. 286, 289, 290, where a non-resident corporation, having saved its right to object to the service of summons, lost it, not by answer, but by a counterclaim.

Decree affirmed.

AMERICAN MILLS COMPANY *v.* AMERICAN SURETY COMPANY OF NEW YORK.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 118. Argued November 24, 1922.—Decided December 11, 1922.

1. In a suit to cancel a written guaranty for fraud, the defence that the plaintiff has an adequate remedy at law by defending actions brought by the defendant on the guaranty, is waived by the defendant where, without insisting upon it as he might, he introduces proof, under a counterclaim for the amount of the guaranty, putting the instrument in evidence. P. 363.
2. The provision of Equity Rule 30, that the answer must state any counterclaim arising out of the transaction which is the subject-matter of the suit, applies only to equitable, not to legal, claims. P. 363.

273 Fed. 67, affirmed.

CERTIORARI to a decree of the Circuit Court of Appeals, affirming a decree of the District Court which canceled a written guaranty for fraud.